

No. 8367

United States

*Vol  
1996*

Circuit Court of Appeals

For the Ninth Circuit.

\_\_\_\_\_

NTAIN STATES TELEPHONE AND  
GRAPH COMPANY,

Appellant,

POOLER,

vs.  
Appellee.

\_\_\_\_\_

Transcript of Record

\_\_\_\_\_

Appeal from the District Court of the  
United States for the District of Montana.

**FILED**

JAN - 4 1937

PAUL P. O'BRIEN,  
CLERK

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No. 8367

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United States  
District Court of Appeals

For the Ninth Circuit.

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UNITED STATES TELEPHONE AND  
GRAPH COMPANY,

Appellant,

vs.

COOLER,

Appellee.

---

Transcript of Record

---

Appeal from the District Court of the  
United States for the District of Montana.





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When deemed likely to be of an important nature, matters appearing in the original certified record are in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. An omission from the text is indicated by printing in italics between which the omission seems to occur.]

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D ADDRESSES OF ATTORNEYS  
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SMITH, JR.,  
Colorado,

N, RASCH, HALL & GUNN,  
Montana, and

WALKER,  
Montana,  
neys for Appellant and Defendant.

DAVIS,  
Montana, and

ERS,  
Montana,  
rneys for Appellee and Plaintiff. [1\*]

In the District Court of the United States  
for the District of Montana.

No. 860.

FRED W. POOLER,

vs.

THE MOUNTAIN STATES TELEGRAPH  
TELEGRAPH COMPANY,

BE IT REMEMBERED, that on the 15th day of  
1934, a Transcript on Removal from the District  
Court of the State of Montana, was filed herein, the complaint  
Transcript being in the words and to-wit: [2]

In the District Court of the Second  
Judicial District  
of the State of Montana in and for  
the County of Silver Bow.

No. 34738.

FRED W. POOLER,

vs.

THE MOUNTAIN STATES TELEGRAPH  
TELEGRAPH COMPANY,

COMPLAINT.

Comes now the above-named plaintiff  
and defendant, and the cause of action against the above  
named defendant, complains and alleges as follows,



I.

Defendant above-named, The Mountain States Telephone and Telegraph Company, is and has been at the times herein mentioned a corporation organized under and by virtue of the laws of the State of Colorado, and as such engaged in business in the City of Butte, County of Silver Bow, State of Montana.

II.

About the 5th day of November, 1932, The Mountain States Telephone and Telegraph Company, a corporation, through its agents, servants, and employees, was engaged in the installation, repair, and maintenance of its telephone lines and poles in the neighborhood of the home of the plaintiff, which said home is located at 1829 North Broadway, City of Butte, County of Silver Bow, State of Montana.

III.

About the 5th day of November, 1932, The Mountain States Telephone and Telegraph Company, a corporation, by and through its agents, servants, and employees, carelessly and negligently, placed three reels of telephone wire in the plaintiff's yard and did so without the consent of the plaintiff and against his will; that the said reels of wire was approximately three inches to three feet in diameter and contained approximately 140 feet of wire. [3]

## IV.

That on or about the.....day of ..... and several times thereafter, plaintiff requests and demands of the said ..... it remove the aforesaid three reels from his property.

## V.

That notwithstanding the repeated demands of plaintiff, that said ..... the said three reels of wire from ..... ises, the said defendant, The Mount ..... phone and Telegraph Company, a ..... lessly and negligently failed and ..... said three reels of wire.

## VI.

That on or about the 20th day of ..... plaintiff was walking in his yard ..... ises and while so doing and while ..... and caution, his feet became entan ..... which caused him to trip and fall ..... ground with great force and violence ..... of said fall plaintiff was severely ..... aged in this, to-wit:—that upon st ..... as herein alleged, the plaintiff stru ..... of his back, his right hip, right ..... shoulder so as to bruise, injure ..... lower back, right hip, right leg, a ..... causing his said right leg to be ..... colored from the right hip to the ..... ning and bruising his nose, and c

plaintiff to become unconscious, and to  
pain and anguish, leaving plaintiff's  
and weak, and making it impossible  
plaintiff to walk or to get around without  
and cane; that because of the pain  
right side of plaintiff caused by the  
all herein complained of, plaintiff is  
righten up, he is unable to stoop over,  
anything from the floor; his right arm  
pain him, making it impossible for  
the right arm above his head; that as a  
fall and injuries the pain in the back  
of plaintiff is so intense that plain-  
main in bed more than an hour or  
ger at night; that as a result of said  
pain in [4] the back and right side  
it is necessary for plaintiff to go to  
in a chair; that as a result of said  
es, plaintiff continuously suffers from  
hes, has a soreness in the right side  
that as a result of said fall and inju-  
as developed in the right side of the  
tiff which is painful and which said  
more painful when plaintiff uses his  
e and arm; that as a result of said  
ies sustained as herein alleged, plain-  
ontinual pain in his neck; that as a  
said fall and injuries, as herein com-  
aintiff's feet and legs are swollen up  
that his left thigh is swollen from the  
t as a result of said fall and injuries

herein complained of, the plaintiff received a severe injury to the spinal column involving the muscles, ligaments, tendons of his back, also a separation of the sacro-spondyl joint, causing him discomfort, and almost complete disability; that as a result of said fall and injuries, plaintiff is completely unable to give any strong support about his lower back so that he may stand erect and without walking sticks; that this plaintiff is unable to raise his right leg in the ordinary manner; that on the said 20th day of June, 1933, to the best of his knowledge of this complaint, this plaintiff has been unable to resume his work as a blacksmith in Butte, Montana, or to do any other kind of work at all; that plaintiff is informed by his medical attendants, surgeons and believes that his injury is permanent and that he will never be able to obtain employment as a blacksmith in the future or to do any other kind of labor; that as a result of said injuries plaintiff has been caused to suffer permanent pain in the right side and lower part of his back; that he has been caused to suffer permanent injuries to his entire nervous system; that as a result of said injuries plaintiff was caused to suffer mental and physical pain and will continue to suffer in the future. [5]

## VII.

That by reason of the aforesaid injuries, plaintiff in said fall, as herein alleged, pl

Hospital in the City of Butte, County  
, State of Montana, for attention and  
n said hospital for a period of seven  
since the discharge of this plaintiff  
pital, he has continued to be under  
reatment of a regularly qualified and  
dical doctor and surgeon and has  
sited, treated, or has called upon said  
least once per week for every week  
; that the physical condition of this  
ting from said fall has required the  
ment of a physician and surgeon as  
;

#### VIII.

result of said injuries plaintiff was  
er a hospital and to obtain the serv-  
ers and nurses, have X-rays taken,  
icines, and receive treatments; that  
es that the cost of hospitalization,  
ervices, medicines, X-rays, and treat-  
ed is and will be approximately the  
0, which amount plaintiff alleges to

#### IX.

son of the aforesaid commissions and  
the said defendant, The Mountain  
one and Telegraph Company, a cor-  
agents, servants, and employees, this  
een damaged in the sum of Thirty-five  
lars (\$35,000.00).



Comes now the above-named plaintiff bringing a second count against the above defendant complains and alleges as follows:

### I.

That the defendant above-named Mountain State Telephone and Telegraph Company was during all of the times hereinafter mentioned a corporation existing under and by the laws of the State of Colorado, and was engaged in the telephone business in the County of Silver Bow, State of Montana.

### II.

That on or about the 5th day of August, 1911, the said defendant, The Mountain State Telephone and Telegraph Company, a corporation, through its servants, agents, and employees, caused to be constructed, repaired, and maintained a system of wires and poles in the vicinity of the plaintiff's home, which said home is situated on Banks Avenue, City of Butte, County of Silver Bow, State of Montana.

### III.

That on or about the 5th day of August, 1911, the said defendant, The Mountain State Telephone and Telegraph Company, a corporation, through its agents, servants, and employees, wilfully, oppressively, and maliciously caused to be strung reels of telephone wire in plaintiff's home, so without the consent of plaintiff, and against plaintiff's will; that each of the said reels of wire was approximately two feet six inches to three feet in diameter and held approximately 140 feet

IV.

about the.....day of.....  
times thereafter, plaintiff made re-  
s and demands of the said defendant  
e the aforesaid three reels of wire  
erty.

V.

hstanding the repeated requests and  
plaintiff that said defendant remove  
reels of wire from plaintiff's prem-  
defendant, The Mountain States Tele-  
telegraph Company, a corporation,  
ilfully, oppressively, and maliciously,  
fused to remove said three reels of

VI.

about the 20th day of June, 1933,  
walking in his yard and on his prem-  
e so doing and while using due care  
his feet became entangled in said wire,  
him to trip and fall and strike the  
reat force and violence, and by reason  
plaintiff was severely injured and  
this, to-wit: that upon striking the  
rein alleged, the [7] plaintiff struck  
t of his back, his right hip, right leg,  
ulder so as to bruise, injure, and dam-  
back, right hip, right leg, and right  
sing his said right leg to be bruised  
l from the right hip to the right knee,  
bruising his nose, and cutting his left

ear, causing plaintiff to become un-  
suffer severe pain and anguish, le  
back painful and weak, and maki  
for the plaintiff to walk or to get a  
back brace and cane; that because  
the back and right side of plaintiff  
injuries and fall herein complained  
unable to straighten up, he is unabl  
or pick up anything from the floor  
and shoulder pain him, making it  
him to raise the right arm above h  
a result of said fall and injuries  
back and right side of plaintiff is  
plaintiff cannot remain in bed mor  
or somewhat longer at night; that  
said injuries and pain in the back  
of plaintiff, it is necessary for pl  
sleep sitting in a chair; that as a r  
and injuries, plaintiff continuous  
severe headaches, has a soreness i  
of his neck; that as a result of said  
a lump has developed in the right  
of plaintiff which is painful and  
is made more painful when plaiti  
shoulder and arm; that as a result  
injuries sustained as herein alleg  
had continual pain in his neck; th  
said fall and injuries, as herein  
plaintiff's feet and legs are swollen  
that his left thigh is swollen from  
that as a result of said fall and inju



plaintiff has suffered a severe injury to the vertebral column of his body, involving the ligaments, tendons, and nerves of his back, and dislocation of the sacro-illiac joint, causing extreme and severe pain, and almost complete inability to stand as a result of said fall and injuries, and is compelled to wear a strong support around his lower back in order that he may stand upright without which said support this plaintiff is unable to raise himself to an erect position in the morning; that from the said 20th day of August, 1908, to the date of the filing of this complaint, plaintiff has been unable to resume his employment as a blacksmith at the mines of Butte, Montana, or any other kind of work at all; that plaintiff has been informed by physicians and surgeons that his injuries are permanent and that he will never be able to resume his employment as a blacksmith at [8] the mines of Butte, or to do any kind of labor or work at all; that as a result of the injuries so complained of, plaintiff has been unable to suffer pain and anguish in the lower part of his back and has been rendered unable to suffer permanent shock and injuries to his nervous system; that as a result of said fall and injuries plaintiff was caused to suffer much mental anguish and will so continue to suffer in

## VII.

In view of the aforesaid injuries sustained by plaintiff as herein alleged, plaintiff was taken

to the Murray Hospital in the City of Silver Bow, State of Montana, for was confined to said hospital for a weeks; that since the discharge from said hospital, he has continued the care and treatment of a regular practicing medical doctor and surgeon either been visited, treated, or has consulted a physician at least once per week since said fall; that the physical condition of plaintiff resulting from said fall has been the care and treatment of a physician herein alleged.

#### VIII.

That as a result of said injuries plaintiff was obliged to enter a hospital and to pay the services of doctors and nurses, have purchased medicines, and receive treatment. Plaintiff alleges that the cost of hospital expenses, professional services, medicines, X-rays rendered is and will be approximately \$450.00, which amount plaintiff alleges is reasonable.

#### IX.

That by reason of the aforesaid negligence and omissions of the defendant, The Montana Telephone and Telegraph Company, its agents, servants and employees, plaintiff has been damaged in the sum of Twenty Five Thousand Dollars (\$25,000.00).

WHERE, Plaintiff prays judgment against Defendant, The Mountain States Telephone Company, a corporation, in the sum of Twenty-five Thousand, Four Hundred Fifty [9] Dollars, lawful money of the United States, together with interest at the rate of eight per cent (8%) per annum from the 20th day of June, 1933, to the time of the entry of judgment and for the costs of suit, as actual damages: a sum of Twenty-five Thousand (\$25,000.00), lawful money of the United States, with interest at the rate of eight per cent per annum from the 20th day of June, 1933, to the time of the entry of judgment herein, as actual damages and for the wilful, malicious, fraud, and omissions of the Defendant, The Mountain States Telephone and Telegraph Company, a corporation; and for such other and further relief as to the Court may seem meet and equitable in the premises.

L. C. MYERS

T. J. DAVIS

Attorneys for Plaintiff, Fred  
W. Pooler

ana  
ver Bow—ss.

POOLER, being first duly sworn, on oath deposes and says:  
That he is the plaintiff in the above-entitled account, and has read the above and foregoing

Complaint, and knows the contents of the same, and that the same is true of his own knowledge as to such things stated on information furnished to him, and as to those things he believes to be true.

FRED W. POOLER

Subscribed and sworn to before me on the 8th day of November, A. D. 1933.

[Notarial Seal] THOMAS

Notary Public for the State of Montana,  
at Butte, Montana. My commission expires  
the 8th day of August, 1934.

[Endorsed]: Filed Jan. 9, 1934. [

---

That the Notice of Intention of Removal for Taxation for Removal contained in the Taxation for Removal filed herein on Jan. 9th, 1934, and figures following, to-wit: [11]

[Title of Court and Cause.]

NOTICE OF INTENTION OF  
PETITION FOR REMOVAL

To FRED W. POOLER, Plaintiff,  
entitled Cause, and L. C. MYERS,  
DAVIS, His Attorneys:

You, and each of you, are hereby notified that the Plaintiff, Fred W. Pooler, of The Mountain States Telephone and Telegraph Company, defendant in the above-entitled Cause, intends to and is about to file, on the 8th day of December, 1933, in the above-entitled

the Judge of said Court, its petition above-entitled cause be removed to the Court of the United States for the District of Montana, and also a good and sufficient bond on which will present said bond to said Court for acceptance and approval in connection with the removal, upon the presentation of the petition for removal to said Court, a copy of the petition and of said bond on removal served upon you, together with this

4th day of December, A. D. 1933.

HILTON SMITH, JR.

GUNN, RASCH, HALL & GUNN

Attorneys for Defendant.

Filed Jan. 9, 1934. [12]

---

petition for Removal to Federal Court, the Transcript on Removal filed herein on January 9, 1934, is in the words and figures following:

[13]  
[Caption and Cause.]

PETITION.

That the District Court of the Second Judicial District of the State of Montana, in the County of Silver Bow:

is a party of the defendant, The Mountain States Telephone and Telegraph Company, in the

above-entitled cause respectfully  
resents:

1. That the above-entitled suit  
by the plaintiff on the 23rd day of  
to recover of the said defendant the  
450.00) Sixty Thousand Four Hun  
dars damages for alleged injury  
who alleges that on June 20, 1932  
in his own yard in Butte, Montana  
fell over some reels of wire belong  
defendant; that said reels of wire we  
negligently placed in plaintiff's yard  
servants or employees of the defend  
the 5th day of November, 1932, and  
tiff thereafter repeatedly requested  
the defendant to remove said reels  
the defendant, notwithstanding said  
lawfully, willfully, oppressively  
failed and refused to remove said r  
his property; that by reason of said  
severe injuries and damages to  
\$60,450.00. [14]

2. That summons in said action  
the defendant, The Mountain State  
Telegraph Company, on November

3. That your petitioner disputes  
claims and demands, and denies any  
thereon, and denies any and all r  
the injuries, if any, which the said  
to have sustained.



is an action wholly of a civil nature in dispute in said cause exceeds, interest and costs, the sum of Three Thousand dollars, all of which will more fully appear in the bill of particulars filed in said suit, which is hereby made a part hereof.

The controversy in this action is wholly between parties of different states; that at the time of the commencement of this action the plaintiff herein named has been and he is now, a citizen of the State of Montana; that your petitioner, the Mountain States Telephone and Telegraph Company, at the time of the commencement of this action was, ever since has been and is now, a corporation, organized and existing under and subject to the laws of the State of Colorado. Your petitioner desires to remove this cause from the District Court of the United States, for the District of Montana, upon the ground of the diversity of citizenship of the said plaintiff and said defendant, as herein particularly set forth.

Your petitioner herewith presents a good and sufficient bond, as provided and required by the laws of such cases made and provided, that your petitioner in the District Court of the United States for the District of Montana, within thirty days from the date of the filing of this petition, a certified copy of the record of the proceedings and for the payment of all costs that may be assessed by the said District Court of the United States for the District of Montana, if said

District Court shall hold that the tiled action was wrongfully or imp thereto. [15]

WHEREFORE, your petitioner action be removed to the District United States, for the District of that this Honorable Court accept the said bond and proceed no farther except to make an order for the action to the District Court of the for the District of Montana, and bond herein presented.

THE MOUNTAIN STATES  
AND TELEGRAPH COM

By J. N. WHITTINGHILL  
Manager for the Sta

MILTON SMITH, JR.

GUNN, RASCH, HALL & GUNN  
Attorneys for Petition

State of Montana,  
County of Lewis and Clark—ss.

J. N. Whittinghill, being first duly sworn, and says: That he is an officer of The Mountain States Telephone & Telegraph Company, to-wit, Manager for the State of Montana, and makes this verification as such on behalf of said defendant; that affiant has seen the foregoing petition for the removal of the District Court of the United States of Montana, and knows the contents



es and things therein set forth are

J. N. WHITTINGHILL

and sworn to before me this 14th day  
of January, A. D. 1933.

[1] A. A. MAJOR

for the State of Montana, residing  
in Montana. My commission expires  
January 1, 1934.

Filed Jan. 9, 1934. [16]

---

and on Removal, contained in the  
Removal filed herein on Jan. 9th,  
the words and figures following,

and Cause.]

COND ON REMOVAL.

L MEN BY THESE PRESENTS:  
Mountain States Telephone and Telegraph  
Corporation, organized and existing  
in virtue of the laws of the State of  
Montana, principal, and the Fidelity & Deposit  
Company of Maryland, a Surety Corporation, or-  
ganized and existing under the laws of the State of  
Maryland, duly authorized to do business in  
Montana, as Surety, are held and  
bound to Fred W. Pooler, the above named  
debtor, the penal sum of Three Hundred

(§300.00) Dollars, for the payment and truly to be made, to the said we bind ourselves, our representatives and assigns, jointly and severally, presents.

Signed and sealed this 14th day of 1933.

The condition of this obligation

WHEREAS, The Mountain States and Telegraph Company, the defendant in the above-entitled action, is about to be removed to the District Court of the Second Judicial District of the State of Montana, in and for the County of Yellowstone, by the said Fred W. Pooler, Plaintiff, for the removal of a certain action now pending, wherein the said Fred W. Pooler is Plaintiff and The Mountain States and Telegraph Company, a corporation, is Defendant, to the District Court of the United States for the District of Montana: [18]

NOW, If the said The Mountain States and Telegraph Company shall enter an appeal to the Court of the United States, for the District of Montana, within thirty days from the date of said petition for removal, a certified copy of record of said action and shall we pay all costs that may be awarded by said Court of the United States, for the District of Montana, if said District Court shall hold that the removal was wrongfully or improperly removed, then this obligation to be void, otherwise to be in full force and virtue.

our hands this 14th day of December,

MOUNTAIN STATES TELEPHONE  
TELEGRAPH COMPANY,

C. N. WHITTINGHILL

Manager for the State of Montana.

[Seal] FIDELITY & DEPOSIT

COMPANY OF MARYLAND

By S. T. NOLAND

Its Attorney in Fact.

Surety.

Filed Jan. 9, 1934. [19]

---

Order of Removal, contained in the  
Removal filed herein on Jan. 9th,  
the words and figures following,

and Cause.]

#### ORDER OF REMOVAL.

That, The Mountain States Telephone  
Company, having filed, within the  
by law, its petition for removal of  
the District Court of the United States,  
of Montana, and having, at the  
its bond in the sum of Three Hun-  
Dollars, with the Fidelity & Deposit  
and sufficient surety, and condi-  
g to law, and it being shown that

the notice required by law of the petition and bond had, prior to the petition, been served upon the party to which notice the Court finds was required in accordance with the requirements of the law. The bond and petition are hereby accepted and IT IS ORDERED that this writ be returned to the District Court of the United States for the District of Montana, pursuant to the provisions of the United States Constitution, upon the payment of the regular and customary fees of this Court will proceed no farther unless said action shall be remanded by the said United States District Court of Montana.

Dated this 15th day of December

FRANK L.

[Endorsed]: Filed Jan. 9, 1934.

On Jan. 13th, 1934, Notice of Removal  
was filed, in the words and figures follow-

Court of the United States for the  
District of Montana. Butte Division.

WILLIAM  
DOLER,

Plaintiff,

vs.

MAIN STATES TELEPHONE AND  
TELEGRAPH COMPANY, a corporation,  
Defendant.

#### NOTICE OF REMOVAL.

Plaintiff and to L. C. MYERS  
and W. H. DAVIS, Plaintiff's Attorneys:

Please take notice that the above-enti-  
tled petition and bond filed by defend-  
ant, was by order made December  
1933, transferred to the District Court of  
the District of Montana, and  
a copy of the record in said cause was  
filed in the said United States District Court  
of January, 1934.

January 9th, 1934.

WILTON SMITH, JR.

W. H. GUNN, RASCH, HALL & GUNN

Attorneys for Defendant.

Due personal service of within 1  
made and admitted and receipt  
edged this 10th day of January, 1

T. J. DAVI

L. C. MYER

Attorney

[Endorsed]: Filed Jan. 13, 1934

---

Thereafter, on February 7th, 1  
Complaint was filed herein, in the  
following, to-wit: [24]

[Title of Court and Cause.]

DEMURRER.

Comes now the defendant and d  
plaint on file herein in the abo  
upon the following ground:

I.

That said complaint does not st  
to constitute a cause of action  
defendant.

MILTON SMITH, J.

GUNN, RASCH, H.

Attorneys

Due and personal service of  
made and admitted and receipt  
edged this 7th day of February, 1

T. J. DAVI

L. C. MYER

Attorney

[Endorsed]: Filed Feb. 7, 1934.

May 1, 1934, an

**SUSTAINING DEMURRER  
TO COMPLAINT**

entered herein, in the words and  
g, to-wit: [26]

and Cause.]

alleges that in plaintiff's yard de-  
3 reels of wire, that plaintiff re-  
l not done, and that some seven  
plaintiff entangled his feet in the wire

e insufficient facts.

v of the situation, was no trap or  
dangerous to him he knew it, and  
relieved himself by removal, heaved  
nce. He did not, acquiesced, and if  
umbled over it to his damage, it is  
nsequence which in legal contempla-  
rily incurred with full knowledge.  
reated a condition not dangerous in  
as not the proximate cause of the  
as plaintiff's somehow, sometime en-  
t with knowledge and acquiescence.

**BOURQUIN**

Judge.

Filed May 1, 1934. [27]



Thereafter, on May 5th, 1934, a complaint was filed, herein, in the following, to-wit: [28]

[Title of Court and Cause.]

### AMENDED COMPLAINT

Comes now the above-named plaintiff of Court, having been first had a return of this his Amended Complaint, and a writ of action against the above named defendant, complains and alleges as follows, to-wit:

#### I.

That the defendant above named is the States Telephone and Telegraph Company, which was during all of the times hereinbefore mentioned, a corporation, existing under and by the laws of the State of Colorado, and as such is engaged in the telephone business in the City of Silver Bow, State of Montana.

#### II.

That on or about the 5th day of May, 1934, the said defendant, The Mountain Telephone and Telegraph Company, a corporation, by its servants, agents, and employees, was engaged in the construction, repair, and maintenance of wires and poles in the neighborhood of the home, which said home is located on 1st Avenue, City of Butte, County of Butte, State of Montana.



III.

On the 5th day of November, 1932, the Mountain States Telephone and Telegraph Company, a corporation, by and through its agents, and employees, carelessly and negligently removed three rolls of telephone wire [29] from the premises of the plaintiff and did so without the consent of the plaintiff against his will; that each of the said rolls was approximately two feet six inches in diameter and held approximately

IV.

On the.....day of..... thereafter, plaintiff made repeated demands of the said defendant that it return the said three reels of wire from his

V.

In standing the repeated requests and demands of plaintiff that said defendant remove the said rolls of wire from plaintiff's premises, defendant, The Mountain States Telephone and Telegraph Company, a corporation, carelessly and negligently failed and refused to remove said rolls of wire.

VI.

A narrow walkway runs from plaintiff's premises to the alley and in a westerly direction from the alley to plaintiff. That said three rolls of wire were placed by the defendant to the north of the alley and abutting the alley and at a

distance from said walkway of feet; that the tension on the wire was great; that on or about the 1933, and before plaintiff fell on a clamp or appliance that held the wire on one of said rolls against removal, broken, or insecurely placed in the first instance, and that the end of the wire caused same to uncoil much the same as a spring, and was sprung and unwound and by so doing struck plaintiff on the head while on said walkway; that plaintiff did not know the wire had encompassed the walkway until after he had fallen thereon as alleged. [30]

#### VII.

That on or about the 20th day of August, 1933, between the hours of 6:00 and 7:00 a. m. plaintiff was walking on the sidewalk in front of his premises and in a westerly direction. At that time did so the sun shone in his face and it was difficult for him to see, and while walking plaintiff, was using due care and attention at said time and place his feet were struck by said wire, which caused him to fall and strike the ground with great force and by reason of said fall plaintiff was injured and damaged in this, to-wit: by striking the ground as herein alleged, plaintiff struck the lower part of his back and right leg, and right shoulder so as to

lower back, right hip, right leg, and causing his said right leg to be colored from the right hip to the knee, and bruising his nose, and ear, causing plaintiff to become unable to suffer severe pain and anguish, plaintiff's back painful and weak, and impossible for the plaintiff to walk or sit without a back brace and cane; that as a result of the pain in the back and right side of plaintiff caused by the injuries and fall herein committed, plaintiff is unable to straighten up, he is unable to bend over, or pick up anything from the floor, and the arm and shoulder pain him, making it impossible for him to raise the right arm above his head as a result of said fall and injuries sustained; that the back and right side of plaintiff is so painful that plaintiff cannot remain in bed more than a few hours somewhat longer at night; that as a result of the injuries and pain in the back and right side of plaintiff, it is necessary for plaintiff to sit in a chair; that as a result of the injuries, plaintiff continuously suffers headaches, has a soreness in the back of his neck; that as a result of said [31] fall, a lump has developed in the right neck of plaintiff which is painful and which is made more painful when plaintiff bends his right shoulder and arm; that as a result of the injuries sustained as herein alleged, plaintiff has continual pain in his neck; that as



VIII.

ent, its agents, servants, and em-  
e in the exercise of reasonable care  
ould have known that the wire  
uld spread and scatter as it did  
of the outer end of said wire and  
g released that said wire would  
aid walkway; that plaintiff did not  
ension on said wire was so great  
alize that upon the release of the  
aid wire that same would scatter  
cover the aforesaid walkway, nor  
w or realize that said reels of wire  
n any respect.

IX.

on of the aforesaid injuries sus-  
all, as herein alleged, plaintiff was  
rray Hospital in the City of Butte,  
r Bow, State of Montana, for at-  
s confined in said hospital for a  
weeks; that since the discharge  
f from said hospital he has con-  
der the care and treatment of a  
ed and practicing medical doctor  
d has either been visited, treated,  
pon said physician at least once  
ery week since said fall; that the  
on of this plaintiff resulting from  
quired the care and treatment of a  
urgeon as herein alleged.

## X.

That as a result of said injury plaintiff was obliged to enter a hospital and to call upon a number of doctors and nurses, have X-rays, and receive medicines, and receive treatment, and plaintiff alleges that the cost of hospitalization, nursing services, medicines, X-rays, and other expenses incurred is and will be approximately \$450.00, which amount plaintiff considers reasonable. [33]

## XI.

That by reason of the aforesaid omissions of the said defendant States Telephone and Telegraph Corporation, its agents, servants, and employees, plaintiff has been damaged in the sum of five Thousand Dollars (\$35,000.00)

Comes now the above named plaintiff bringing a second count against the defendant complains and alleges as follows:

## I.

That the defendant above named States Telephone and Telegraph Corporation during all of the times herein mentioned was a corporation existing under and governed by the laws of the State of Colorado, and was engaged in the telephone business in the County of Silver Bow, State of Mo



II.

About the 5th day of November, 1932, The Mountain States Telephone Company, a corporation, through agents, and employees, was engaged in the installation, repair, and maintenance of its telephone lines and poles in the neighborhood of the home of plaintiff which said home is located at 1829 North 1st Street, City of Butte, County of Silver Bow, Montana.

III.

About the 5th day of November, 1932, The Mountain States Telephone and Telegraph Company, a corporation, by and through its agents, and employees, unlawfully, willfully, and maliciously, placed three reels of wire in plaintiff's yard and did so without the consent of plaintiff and against his interest. The length of the said three reels of wire was approximately two feet six inches to three feet in length and held approximately 140 feet of wire.

IV.

About the ..... day of ..... thereafter, plaintiff made repeated requests of the said defendant to remove the aforesaid three reels of wire from his yard.

V.

Notwithstanding the repeated requests and demands of plaintiff that said defendant remove



the said three reels of wire from  
ises, the said defendant, The Moun  
phone and Telegraph Company, a  
lawfully, wilfully, oppressively,  
failed and refused to remove said  
wire.

## VI.

That a cement walkway runs  
back door to the alley and in a v  
from the home of plaintiff. That  
of wire were by the defendant pla  
of said walkway and abutting th  
distance from said walkway of a  
feet; that the tension on the wire  
was great; that on or about the 2  
1933, and before plaintiff fell ov  
clamp or appliance that held the  
wire on one of said reels against t  
removed, broken, or insecurely pl  
in the first instance, and that t  
said end of the wire caused sam  
spread much the same as a sprin  
wire sprung and unwound and b  
oped the said walkway; that plain  
that said wire had encompassed  
herein charged until after he had  
inafter alleged.

## VII.

That on or about the 20th day o  
between the hours of 6:00 and 7  
plaintiff was walking on [35] the

s and in a westerly direction, and  
he sun shone in his face and eyes  
ult for him to see, and while so  
intiff, was using due care and cau-  
id time and place his feet became  
id wire, which caused him to trip  
strike the ground with great force  
nd by reason of said fall plaintiff  
jured and damaged in this, to-wit:  
ng the ground as herein alleged, the  
the lower part of his back, his right  
and right shoulder so as to bruise,  
age his lower back, right hip, right  
shoulder, causing his said right leg  
nd discolored from the right hip to  
skinning and bruising his nose, and  
ear, causing plaintiff to become un-  
to suffer severe pain and anguish,  
ff's back painful and weak, and  
ossible for the plaintiff to walk or to  
hout a back brace and cane; that  
pain in the back and right side of  
by the injuries and fall herein com-  
ntiff is unable to straighten up, he is  
over, or pick up anything from the  
arm and shoulder pain him, making  
r him to raise the right arm above  
as a result of said fall and injuries  
back and right side of plaintiff is so  
aintiff cannot remain in bed more  
r somewhat longer at night; that as

a result of said injuries and pain on the right side of plaintiff, it is necessary for plaintiff to go to sleep sitting in a chair; that as a result of said fall and injuries, plaintiff suffers from severe headaches, has a lump on the right side of his neck; that as a result of said fall and injuries a lump has developed on the right side of the neck of plaintiff which is painful; that as a result of said lump is made more painful with the use of his right shoulder and arm; that as a result of said fall and injuries sustained as hereinbefore stated plaintiff has had continual pain in his back as a result of said fall and injuries hereinbefore complained of, plaintiff's feet and legs are stiff and to his knees; that his left thigh is stiff and bent at the hip down; that as a result of said fall and injuries hereinbefore complained of, the plaintiff has suffered a severe injury to the spine of his back, involving the muscles, ligaments and nerves of his back, also a separation of the sacroiliac joint, causing him discomfort and almost complete disability; that as a result of said fall and injuries plaintiff is unable to get a strong support about his lower back so that he may stand erect and without pain; that as a result of this plaintiff is unable to raise his right leg in position in the ordinary manner; that on the 20th day of June, 1933, to the date of the filing of this amended complaint, this plaintiff is unable to resume his work as a blacksmith at Butte, Montana, or to do any other work.

plaintiff is informed by physicians and believes that his injuries are permanent and will never be able to resume his occupation as a blacksmith at the mines of Butte, or any other kind of labor or work at all; that as a result of said injuries so complained of, plaintiff has been caused to suffer pain and anguish in the upper and lower part of his back and neck, and to suffer permanent shock and injury to his nervous system; that as a result of said injuries plaintiff was caused to suffer much physical pain and will so continue to suffer until cured.

#### VIII.

That defendant, its agents, servants, and employees, were not in the exercise of reasonable care and diligence and should have known that the wire on the ground would spread and scatter as it did upon the walkway at the outer end of said wire and that plaintiff was caused that said wire would cover the walkway; that plaintiff did not know that the danger on said wire was so great and did not know that upon the release of the outer end of the wire that same would scatter and spread upon the aforesaid walkway, nor did plaintiff know that said reels of wire were dangerous to the plaintiff's health and safety.

#### IX.

That as a result of the aforesaid injuries sustained by plaintiff, as herein alleged, plaintiff was

taken to the Murray Hospital in the County of Silver Bow, State of Montana and was confined to said hospital for a period of seven weeks; that since the removal of the plaintiff from said hospital, he has remained under the care and treatment of a duly licensed and practicing medical doctor and has not either been visited, treated, or examined by a physician at least once per week during the fall since said fall; that the physical condition of the plaintiff resulting from said fall has not been the care and treatment of a physician as herein alleged.

#### X.

That as a result of said injury the plaintiff is obliged to enter a hospital and to pay the fees of doctors and nurses, have medicines purchased, and receive treatment. The plaintiff alleges that the cost of hospital services, medicines, X-ray services, and other services rendered is and will be approximately \$450.00, which amount the plaintiff deems reasonable.

#### XI.

That by reason of the aforesaid negligence and omissions of the defendant, The Montana Telephone and Telegraph Company, its agents, servants, and employees, the plaintiff has been damaged in the sum of thirty-five thousand Dollars (\$35,000.00). [38]

THE plaintiff prays judgment against defendant, The Mountain States Telephone Company, a corporation, in the sum of One Thousand, Four Hundred, Fifty Dollars (\$1,450.00), lawful money of the United States, with interest at the rate of eight per centum per annum from the 20th day of the month of January, 1911, to the time of the entry of judgment, and the costs of suit, as actual damages; and that the plaintiff be awarded a sum of One Hundred Five Thousand Dollars (\$105,000.00) lawful money of the United States, with interest at the rate of eight per centum per annum, as exemplary damages; and such other and further relief as to the court may seem meet and equitable in the premises.

L. C. MYERS

T. J. DAVIS

Attorneys for Plaintiff,

Fred W. Pooler.

America,

and

Bow—ss.

FRED W. POOLER, being first duly sworn, on

and says:

I am the plaintiff in the above entitled action, and have read the above and foregoing complaint, and know the contents thereof, and the same is true of his own knowl-



edge, except as to such things stated  
and belief, and as to those things  
to be true.

FRED W. POOLER

Subscribed and sworn to before me  
of May, A. D. 1934.

[Notarial Seal] · THOMAS  
Notary Public for the State of Montana  
at Butte, Montana. My commission expires  
8, 1934.

[Endorsed]: Filed May 5, 1934

---

Thereafter, on May 18th, 1934, the  
Amended Complaint was filed herewith  
and figures following, to-wit. [40]  
[Title of Court and Cause.]

DEMURRER.

Comes now the above named defendant  
demurs to the amended complaint and  
action therein contained in said  
cause upon the following grounds:

I.

That said amended complaint, and  
causes of action therein contained,  
facts sufficient to constitute a cause of  
action against this defendant.



day of May, 1934.

MILTON SMITH, JR.

GUNN, RASCH, HALL & GUNN

Attorneys for Defendant.

Filed May 18, 1934. [41]

---

July 13th, 1935, an

ORDER OVERRULING DEMURRER TO

AMENDED COMPLAINT

in, in the words and figures fol-

]

W. Pooler vs. Mountain States Tel.

heretofore heard and submitted to the

court in answer to the amended complaint here-

in, filed on this day for decision.

After due consideration, court or-

dering the demurrer be and is overruled and

the defendant is allowed twenty days to answer.

July 13th, 1935.

C. R. GARLOW,

Clerk. [42]

Thereafter, on July 29th, 1933, an Amended Complaint was filed herewith and figures following, to-wit: [43]

[Title of Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the above-named defendant and for its answer to plaintiff's first amended complaint set forth in his amended complaint as follows:

1. Admits the allegations of paragraphs I and II thereof.

2. Denies the allegations of paragraphs III and IV thereof.

3. As to the allegations contained in paragraphs V and VI, denies that plaintiff, at any time on or after the 25th day of June, 1933, ever made any demand of this defendant to remove any of his property.

4. Denies the allegations contained in paragraphs VII and VIII.

5. As to the allegations contained in paragraphs IX and X, denies any knowledge thereof sufficient to form a belief in their truth.

6. Denies the allegations contained in paragraphs XI and XII.

7. As to the allegations contained in paragraphs XIII and XIV, denies any knowledge thereof sufficient to form a belief in their truth.

8. Denies the allegations of paragraphs XV and XVI.

Save and except as hereinbefore admitted or denied, this answering

allegation contained in said first

er answer to plaintiff's first cause  
and for a first affirmative separate  
first cause of action, this answering  
s: [44]

I.

e time the wire referred to in plain-  
was placed in plaintiff's yard, and  
ing the time of the accident alleged  
od of approximately seven months)  
nd appreciated, or, in the exercise  
e, should have known and appre-  
wire constituted an obstacle over  
night trip, stumble or fall.

ll of said time up to and including  
lleged accident, plaintiff could, with  
tion and no expense, or at least  
, have removed or had said wire  
his property, and knew, or, in the  
nary care, should have known said

standing said facts, plaintiff, with  
gligent disregard for the safety of  
ly and negligently allowed said wire  
s property for a period of approxi-  
onths, and with careless and negli-  
for the safety of himself, did, on  
h day of June, 1933, in the daytime,

carelessly and negligently walk in  
property, resulting in his tripping  
on or over said wire, and this def  
any damage or injury that pla  
reason of said fall was due to a  
aforesaid negligence of the plaint

And for further answer to Plain  
of Action and as and for a Seco  
fense thereto, this answering Def

### I.

That from the time the wire re  
tiff's complaint, was placed in pl  
up to and including the time of t  
therein, (a period of approximat  
plaintiff knew and appreciated,  
of ordinary care, should have  
ciated that said wire constituted  
which plaintiff might trip, stum

That during all of said time, u  
the time of the alleged accident, p  
reasonable exertion and no ex- [44  
trifling expense, have removed  
removed from his property, and  
exercise of ordinary care, shoul  
fact.

That, notwithstanding said fa  
careless and negligent disregard  
himself, carelessly and negligently  
to remain on his property for a

months, and with careless and negligent or the safety of himself, did, on or day of June, 1933, in the daytime, negligently walk in said yard, and/or in his tripping and/or stumbling over said wire, and this defendant alleges that the injury that plaintiff sustained by said fall was due to causes, the danger of which plaintiff assumed, as aforesaid.

er answer to Plaintiff's First Cause and for a Third Affirmative Separate, this answering Defendant al-

### I.

time said wire was placed in plain- or on his property, plaintiff knew or, in the exercise of ordinary care, own and appreciated that said wire obstacle over which he might trip,

all of said time, up to and including the alleged accident, plaintiff could, exertion and no expense, or at least have removed said wire from his new, or, in the exercise of ordinary known said fact.

exercise of reasonable care and dili- could have, by removing or having

said wire removed, avoided and/or injury and/or damage to his person. Defendant alleges that plaintiff's injury was due to and proximately caused by the fact that he did not see or move or have said wire removed.

And for further answer to plaintiff's complaint of action and as and for a fourth cause of defense to said first cause of action, defendant alleges:

I.

That from the time said reels were unwound and spread and enveloped in said way, said wire was in plain view of plaintiff all of the time that he was walking up to and including the time that he became entangled in said wire and that plaintiff's fall was the result of his careless and negligent disregard for his own safety, carelessly and negligently falling when he was walking and carelessly walking into and allowed his feet to become tangled in said wire in broad daylight, his tripping and/or stumbling on said wire and this defendant alleges that the injury that plaintiff sustained as a result of said fall was due to and caused by the negligence of the plaintiff.

As and for its answer to plaintiff's complaint of action set forth in his complaint,

1. Admits the allegations of plaintiff's complaint II thereof.



allegations of paragraph III

allegations contained in paragraph  
plaintiff, at any time prior to the  
e, 1933, ever made any request or  
defendant to remove any wire from

allegations contained in para-

allegations contained in paragraphs  
ies any knowledge or information  
to form a belief.

allegations contained in paragraph

allegations contained in paragraphs  
es any knowledge or information  
to form a belief.

allegations contained in para-

pt, as hereinbefore specifically ad-  
, this answering defendant denies  
allegation contained in said second

r answer to plaintiff's second cause  
and for a first affirmative separate  
second cause of action, this answer-  
eges:

I.

e time the wire referred to in  
aint, was placed in plaintiff's yard,





I.

time the wire referred to in plain-  
was placed in plaintiff's yard, and  
ng the time of the accident alleged  
d of approximately seven months)  
nd appreciated, or, in the exercise  
should have known and appreciated  
onstituted an obstacle over which  
rip, stumble or fall.

l of said time, up to and including  
leged accident, plaintiff could, with  
ion and no expense, or at least  
have removed or had said wire re-  
property, and knew, or, in the exer-  
care, should have known said fact.  
tanding said facts, plaintiff, with  
ligent disregard for the safety of  
y and negligently allowed said wire  
property for a period of approxi-  
nths, and with careless and negli-  
or the safety of himself, did, on or  
ay of June, 1933, in the daytime,  
gligently walk in said yard, and/or  
ng in his tripping and/or stumbling  
wire, and this defendant alleges  
or injury that plaintiff sustained,  
d fall, was due to causes, the dan-  
injury of which plaintiff assumed,  
as aforesaid.

And for answer to plaintiff's first cause of action, and as and for a third rate defense thereto, this answer alleges:

I.

That from the time said wire was located in plaintiff's yard and/or on his property, plaintiff knew and appreciated, or, in the ordinary care, should have known and appreciated, that said wire constituted an obstacle which might trip, stumble or fall.

That during all of said time, and at the time of the alleged accident, plaintiff, by reasonable exertion and no expense, could have removed said wire from said property, and knew, or, in the ordinary care, should have known said fact.

That in the exercise of reasonable care and prudence, plaintiff could have, by removing said wire removed, avoided and prevented injury and/or damage to his person. Defendant alleges that plaintiff's injury was due to and proximately caused by the failure to remove or have said wire removed.

And for further answer to plaintiff's second cause of action and as and for a fourth rate defense to said second cause of action, answering defendant alleges:

I.

time said reels or coils of wire  
read and enveloped the said walk-  
was in plain view of the plaintiff  
time that he was walking in said  
including the time that his feet  
in said wire and that plaintiff,  
negligent disregard for the safety  
ssly and negligently failed to look  
king and carelessly and negligently  
allowed his feet to become entan-  
in broad daylight, resulting in his  
stumbling and falling on or over  
s defendant alleges that any dam-  
at plaintiff sustained by reason of  
e to and caused by the aforesaid  
plaintiff.

E, this defendant having fully an-  
at it be dismissed hence with its

TON SMITH,

NN, RASCH, HALL & GUNN

Attorneys for Defendant. [50]

America,

and Clark—ss.

ay of July, A. D. 1935, before me  
ed J. N. WHITTINGHILL, who,  
duly sworn, deposes and says:

Montana Manager of The Moun-  
phone Company, the defendant

herein; that he has read the foregoing Amended Complaint and knows the contents of, and that the same is true to the best of his knowledge, information, and belief, and he makes this verification on behalf of the undersigned because it is a corporation.

J. N. WHITNEY

Subscribed and sworn to before me this 29th day of July, 1935.

[Notarial Seal] RAY D. [unclear]

Notary Public for the State of Montana,  
Helena, Montana. My commission expires  
30, 1937.

Personal service of within Amended Complaint made and admitted and acknowledged this 29th day of July, 1935.

T. J. DAVIS

L. C. MYER

Attorneys

[Endorsed]: Filed July 29, 1935

---

Thereafter, on August 6th, 1935, the same was filed herein, in the words and to the effect following, to-wit: [52]

[Title of Court and Cause.]

REPLY.

Comes now the plaintiff above named, and in answer to the answer on file in the above cause, and admits, denies, and alleges as follows:

1.

every and all of the allegations con-  
stitute affirmative defense to the first

2.

every and all of the allegations con-  
stitute affirmative defense to the first

3.

every, and all of the allegations con-  
stitute affirmative defense to the first

4.

every, and all of the allegations con-  
stitute affirmative defense to the first

1.

every, and all of the allegations con-  
stitute affirmative defense to the second

2.

every, and all of the allegations con-  
stitute affirmative defense to the  
action.

3.

every and all of the allegations con-  
stitute affirmative defense to the second



4.

Denies each, every and all of the contents contained in the fourth affirmative defense set forth as the cause of action.

T. J. DAVIS

L. C. MYERS

Attorneys

State of Montana

County of Silver Bow—ss.

FRED W. POOLER, being first duly sworn, deposes and says:

That he is the plaintiff in the above captioned cause, that he has read the above and foregoing Answer to Amended Complaint, and the contents thereof; that the same are true to the best of his information, knowledge and belief.

FRED W. POOLER

Subscribed and sworn to before me this 6th day of August, 1935.

[Seal]

G. V. [Signature]

Notary Public in and for the State of Montana, residing at Butte, Montana. My commission expires Aug. 27, 1937.

Service of the above and foregoing copy thereof received this 6th day of August, 1935.

GUNN, RASCH, HARRIS

WALKER &amp; WALKER

Attorneys

[Endorsed]: Filed Aug. 6, 1935



November 23rd, 1935, Verdict of  
ed herein, in the words and figures  
: [55]

and Cause.]

VERDICT.

In the above entitled cause, find our  
of plaintiff, Fred W. Pooler, and  
ndant, The Mountain States Tele-  
raph Company, a corporation, and  
iff's actual damages in the sum of  
d Dollars (\$20,000.00) and we fur-  
verdict in favor of plaintiff and  
nt for exemplary damages in the  
ars (\$1.00).

ce, Montana, this 23rd day of No-  
935.

GEORGE OPP

Foreman.

Filed Nov. 23, 1935. [56]

Thereafter, on November 27th was entered herein, in the wording, to-wit: [57]

In the District Court of the United States  
of Montana, Butte Division.

No. 860.

FRED W. POOLER,

vs.

THE MOUNTAIN STATES TELEPHONE  
& TELEGRAPH COMPANY

#### JUDGMENT

This cause and action came on for trial on the 20th, 21st, 22nd, and 23rd days of November, A. D. 1935, before the Court sitting in open court, the plaintiff appearing in person and by counsel L. C. Myers, Esq., and T. J. D. Walker, Jr., Esq., and the defendant appearing by its attorney-in-fact, T. J. D. Walker, Jr., Esq., T. J. Walker, Esq., and W. H. Gunn, Esqs. Witnesses on the part of the plaintiff and defendant were sworn to and examined, the plaintiff presented evidence in support of the plaintiff's proof and the defendant rested, the defendant, The Mountain States Telephone and Telegraph Company, presented evidence in its defense, the Court considered all the evidence and after both parties had rested, Fred W. Pooler and The Mountain States Telephone and Telegraph Company, a corporation,

they and each of them rested, the  
and the jury. Thereupon the cause  
was argued by the attorneys for the  
defendants and at the close of said argu-  
ment retired to consider its verdict, and  
returned into open court with its  
said verdict, after the title of the  
cause was and is in the following words  
to-wit:— [58]

The jury in the above entitled cause,  
has rendered its verdict in favor of plaintiff, Fred W.  
Harris, and against the defendant, The Moun-  
tain Telephone and Telegraph Company,  
and we assess plaintiff's actual  
damages in the sum of Twenty Thousand Dol-  
lars (\$20,000.00) and we further find our ver-  
dict in favor of plaintiff and against defendant  
for exemplary damages in the sum of One  
Thousand Dollars (\$1,000.00).

Given at Butte, Montana, this 23rd day of  
April, A. D. 1935.

GEORGE OPP

Foreman."

BEFORE, by reason of the premises  
and by virtue of the law, IT IS OR-  
DERED, ADJUDGED, AND DECREED, and this  
Court doth judge, and decree, that the plaintiff,  
Fred W. Harris, do have and recover of and from the  
defendant, The Mountain States Telephone and  
Telegraph Company, a corporation, the sum of  
Twenty Thousand Dollars (\$20,000.00) actual dam-  
ages, and One Thousand Dollars (\$1,000.00) exemplary damages,

together with plaintiff's costs ne  
in this action, amounting to the s  
and 77/100 Dollars.

Dated and entered this 27th  
A. D. 1935.

C. R. GARLOV

By HAROLD L. A

---

Thereafter, on January 27th,  
ant's Bill of Exceptions was d  
and allowed, and filed herein, b  
and figures following, to-wit: [60

[Title of Court and Cause.]

BILL OF EXCEPT

BE IT REMEMBERED, That  
cause came on regularly for tria  
titled court before the Honorable  
win, Judge, sitting with a jur  
November 20, 1935, T. J. Davis  
Myers, Esq., appearing as attorn  
tiff: and T. J. Walker, Esq., and  
appearing as attorneys for the de

Thereupon the following proce  
orders made, objections interpo  
by the court and exceptions ta  
ceedings, orders and exceptions l  
ing, had and taken thereon, and

After set out, being all the evidence offered and introduced and offered the testimony and evidence herein and is all the testimony and evidence the court, and was and is all [61] evidence offered by the parties received by the court, and offered to this cause and rejected by the

(After opening statement by Mr. reference to the opening statement, counsel correctly to make the statement. Complaint has two causes of action; try to state the two counts in the view of that I feel it is incumbent on me to move this court for an order directing the plaintiff to elect upon which of the two counts they shall proceed on.

The motion is denied. That is a proper conclusion

R: We desire an exception.

Very well, call the jury. [62]

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RED W. POOLER,

called as a witness in his own right and duly sworn, testified as follows:

Direct Examination.

May it please the court there is a

(Testimony of Fred W. Pooler.)

Mr. GUNN: May I interrupt you on the fact that this stipulation will preclude the introduction to the witness I feel that at any time interpose our formal objection to the introduction of any testimony, and I will then enumerate the grounds.

Comes now the defendant and the introduction of any evidence on the fact that the first cause of action fails to disclose sufficient to constitute a cause of action against the defendant: second, that it discloses on its face a matter of law, that plaintiff was injured from falling or tripping over the wire, allowing it to remain in his yard for a period of approximately seven months and thereafter to a place where he was injured, tripped or fallen over it: third, that it discloses on its face that plaintiff, as a matter of law, was contributorily negligent, in failing to remove the wire from his yard, where he would not have fallen over it for seven months and in not looking out for himself when stepping and in failing to exercise due care: it discloses on its face that the negligence and omissions of the defendant were the proximate cause of plaintiff's injuries: fifth, that it discloses on its face that plaintiff could have avoided the consequences of defendant's alleged negligence by a wrongful act or omission by exercising due diligence and reasonable care for himself.



red W. Pooler.)  
ordinarily prudent man would have  
circumstances, to-wit, by removing  
the yard, or to a place where he  
fallen over it, all of which could  
with very slight effort on his part.  
plaintiff's fall which resulted in  
entirely an avoidable consequence:  
in its face that plaintiff's injuries  
been anticipated by the defendant  
note as to impose no liability on the

same objection and on the same  
on the same grounds, to the second

Overruled.

Exception.

Pursuant to stipulation between  
plaintiff and defendant, the defend-  
we have designated as defendant's  
which is a plat prepared by the  
home and home grounds, and the  
surroundings of the Pooler home  
Banks and Marcia Street, and the  
designated upon the said Exhibit 1  
ers, A, B, and C, are the property  
to the Mountain States Telephone  
Company, the defendant herein.  
agreement, Mr. Gunn.

Yes.

That does not cover the situation  
of the occurrence.

(Testimony of Fred W. Pooler.)

Mr. GUNN: I was just going to say that the stipulation should be directed to the original alleged wrongful act and second, as to the time of the accident. And I also feel that this case considerably if the stipulation is the agreement that the measurements of all things shown on that map are correct.

Mr. DAVIS: Plaintiff will object to the admission of Mr. Gunn with the exception that at the present time shows the Pooler garage was not built at that time. Otherwise we will accept it as being correct. The scene of the Pooler house at the date of the alleged injury.

Mr. GUNN: And also as to the alleged wrongful act of the defendant.

Mr. DAVIS: We will accept it.

The COURT: I personally took the measurements together and put it on paper.

Mr. DAVIS: We will Your Honor.

The WITNESS: My full name is Fred W. Pooler; I reside at 1829 Banks Street. I lived there seventeen and a half years. At that time I have lived in Butte, seventeen years but I lived in Butte, before that time I lived in Butte, about ten years.

I am a blacksmith and have been since I was seventeen years old. I am now at Lead Yard, Iowa. I am a married man.

red W. Pooler.)

my wife at my home in the city  
fe's name is Frances Pooler.

T house; the part of the living  
room is 18 by 20; then there is this  
6 by 24; and my front yard back  
ewalk that was going out to the  
at is grass, lawn, and trees and  
have bluespruce and the Canadian  
have a lilac [65] in the front, and  
ny garden; back of that sidewalk  
y garden spot. I have down next  
ere a strawberry bed, and then I  
unning along the fence this way  
l then I have two lilac bushes set  
t of the fence going south from the  
ave 3 lovely peony bushes that set  
ut 10 feet of the south fence, they  
ning from east and west. Then the  
—well I have 1 tree, a Canadian  
he west end of the house and my  
I have the rest of the plot I have  
I have taken 17 years to develop  
ave described it;

ace I have a picket fence on the  
et fence on the south; the north  
nd the west fence is board. The  
t is on the south side of my place  
s high. The fence on the west side  
board fence 3 feet 6 inches high.  
gate to get in and out of my yard

(Testimony of Fred W. Pooler.)  
on the west side. There is a width of  
a half I believe between the post and  
the south side of my lot; and the  
I think, are an inch and a half  
who might be going toward the  
could be seen plainly through the

On the 20th of June, 1933, the  
wire leaning up against the west  
and there was a garbage can there  
the west end. That gate on the  
*and* is now right in the corner  
To reach that gate on the west  
I walked out from my back porch  
concrete walk of slabs there, all  
gate, and I put concrete there. It  
wide with the exception—I believe  
of slab concrete about a foot thick  
from the top of this concrete block  
in the alley. The walk comes right  
gate in the west; the gate swings  
the end of the walk. At that time  
was a foot from the walk which  
the west fence. There were three  
the fence, and from the sidewalk  
gate it was about six feet as near  
ure it. The three rolls of wire  
were 2 feet 6 inches.

Q. Now Mr. Pooler what type  
done since you were 17 years of  
you learned the blacksmith trade

(Fred W. Pooler.)

When I learned, I learned the carriage  
making horses and general blacksmith;  
and when I learned.

I followed horse shoeing and custom  
work. The first place I worked in  
was the Original Mine and they trans-  
ferred me here to the Anaconda, and then I  
went to the Leonard, or to the Tramway for  
a while. I guess I was there maybe a month,  
and then Nevin transferred me to Southern  
Cross at the Southern Cross and said it  
was hard work and it was hard to get  
any kind of work, and he asked  
me to go and I did and I was up there  
for a while, when the mine shut down and  
they transferred me up here to the Original.  
I made up steel for them, for the  
mine they transferred me from there to  
the Original when the panic of 1921 came on and  
closed all the mines and Mr. Nevin got me  
to Red Lodge, at a big coal [67] mine  
and I worked there  
for about two months and the master  
said, "When we sent you  
to Red Lodge, we didn't  
know you were only taking a man's place  
and we wanted you to take a job over at a com-  
mercial mine at Bear Creek." I said, "That is  
what I did in Bear Creek at a commercial  
mine. It had poor living conditions for my



(Testimony of Fred W. Pooler.)  
family and I quit and I came back  
I went back to the Tramway for  
then Mr. Carrigan had me to go  
and I worked at the Emma I  
years; and from there I went to  
mond. I was at the Bell and D  
say, a couple of years I guess; ma  
a year; I won't say the length of  
Then they transferred me from  
tain Con. I think I was at the M  
3 years when the last depression  
laid me off.

When I first started to work  
they paid me \$6.75; the highest  
paid me, I believe, was \$7.00 and  
I believe \$5.00 was the lowest th  
the depression came I was worki  
Con Mine and that was in 1932.  
mine I worked out here on the r  
velt Drive, and worked there f  
County Surveyor. Out there I  
job they gave me; I was driv  
another man used to load the  
boat made out of thick iron sh  
hitched to it and I used to roll  
onto that sheet and then pull  
the men were laying the walls  
unloaded them there and they  
they wanted them. That was in  
I got laid off there I went up W



ed W. Pooler.)

or 8 days; I won't say, either it  
how, that I worked at that job.

all the men a few days and he  
best he could amongst all the men  
many days work.

to Wise River and worked in the  
6 weeks. Up there I worked for  
few days I pitched the hay into  
ey hauled it to his hay barn and  
ork there and I used to work on  
would go up on pulleys—he just  
e big door at the top of the hay  
put me in there to mound that  
t I worked most of that time up  
at hay away. When I say mound  
ed it and dragged it back to the  
barn and keep the hay level as  
I was able to do a full day's work  
he paid me \$5.00 a day for doing  
he would give me more than the  
paid me \$5.00 a day. That was  
Mr. Marice's ranch is up on Wise  
ieve about 18 miles up the river  
iver Post Office; I am not posi-  
nat is about what it is.

at ranch I came home and got in  
d; got in about 8 cords. I got it  
nd. I cut it and stacked it and  
Butte, I put it in my yard along  
he north fence. I can't say what

(Testimony of Fred W. Pooler.)  
 month it was. I was hauling in  
 October. The weather was pretty  
 part of November, and then I hauled  
 in—I got most of it in September  
 hauled as late as, well the two last  
 the first and second day of December  
 there came a big [69] snow storm

In December, 1932, I was able  
 and haul it and sack it, and carry  
 pretty steep hills and some of it  
 out of the timber because I couldn't  
 down there and I had to pack  
 took out 8 cords of wood.

After I had gotten out the  
 garage. It was built in the month  
 December, 1932. I was able to clear  
 garage as I built it. Ed Lehan,  
 and myself put up the rafters;  
 Hemenlay and myself put up the  
 all my wood after the garage was  
 put the doors in in December.  
 when I put it in.

I have two lots and a half of  
 the lots are 30 feet wide and 100  
 the garden work out there. Before  
 used to spade my ground and plant  
 attend my garden. On my plot I  
 way to plow or dig it up and I  
 The place was not spaded in the  
 Grover Hemenlay spaded it the

ed W. Pooler.)

was in 1932. I raised a garden in  
ed on the 20th of June, 1933. My  
oaded that Spring. I was taking  
fe.

At this time, may it please the  
request that defendant's Exhibit 1  
t depicting the Pooler place be  
nce in accordance with the stip-

Very well, but you had better  
on so the jury will know the facts.

Under the caption of court and  
D]

stipulated and agreed by and be-  
plaintiff and counsel for defend-  
tain map marked Exhibit 1 and  
loyees of the defendant may and  
in evidence as correctly depicting  
thereon, save and except that the  
ereon was not in place until De-

ipulated and agreed that the evi-  
that the poles depicted on said map  
, marked A, B, and C respectively,  
e times involved in this action the  
efendant, and that the wires placed  
all of the times, within the issues  
e property of the defendant."

S: Grover Hemenlay spaded my  
mises at the time to which I testi-  
s badly injured, too badly injured

(Testimony of Fred W. Pooler.)  
to do it myself. I am married.  
in the early Summer of 1933, my  
until, I think it was, about the  
April, when I took her to the ho  
Hospital. My wife was confined  
did not walk about. I took care

I remember being in my home  
of June 20, 1933. I didn't sleep a  
to bed in the morning and I sle  
was going to the hospital to see m  
in; it was late, getting toward  
woke and I jumped up out of m  
the ash pan out of the stove and  
down and took this ash pan and  
way. The garbage can set rig  
fence. The garbage can was ju  
back walk at that time, one fo  
foot.

Mr. DAVIS: We will mark  
Exhibit 1 with the letter A-1, v  
garbage can, one foot from the  
walk.

Mr. GUNN: It is now mark  
tended D marking the location  
as one foot north of the cemen  
west fence, on the day of the .

Mr. DAVIS: That is correct

The WITNESS: The sidewa  
my south line started from m  
went to the gate.

ed W. Pooler.)

from the north side of the cement  
rolls of wire to which you testified?  
we were making out the com-  
t back from the hospital, the reel  
e imprints of the wire was still  
d I measured there and it was as  
ould get.

Now then, Mr. Gunn, will you,  
e map with the letter E to indicate  
feet from the north side of this  
h is the spot—

am now marking the point along  
Mr. Pooler's yard one and one-  
g it X, indicated by E as the place  
as,—where the marks of the wire  
ooler returned from the hospital.

That is correct.

and that was against the fence.

S: Yes, that was as near as I  
se marks were clearly defined on  
hen there was a couple of pieces  
t had been to tie around the wire  
ng on the ground. That was when  
the hospital.

how far would you estimate the  
have been leaning up against your  
orth side [72] of that walk at a  
e injury?

mean the edge that laid next to the

(Testimony of Fred W. Pooler.)

Q. Yes.

A. Well I should think it was  
feet.

I had observed that wire before  
many times. It had remained at  
imately about 6 feet from the  
sidewalk and continued leaning  
until the time of my injury or  
there a long time. On the 20th  
I had occasion to go out to my  
pan of ashes. I couldn't say  
was; I didn't look at the clock  
low enough that it struck my gla  
see; it kind of,—well you know  
the windshield of an automobi  
blind you. I would judge it was  
or 6:30, maybe 7:00 o'clock. I  
earlier than that, I couldn't sw  
earlier than that. As I walked  
in the back yard of my house  
empty this pan of ashes in the  
approached the west fence of m  
my feet in this wire. I didn't  
to fall and I tried to save mys  
I didn't know it right then, w  
you know, and I fell and as I  
gate and the gate was unlatched  
to the outside, and the gate  
grabbed it and it turned me so  
I hit the ground I tried to b



ed W. Pooler.)

ch off balance and as I hit the  
lt something snap and my feet  
I seen the wire. I just got a  
re that was entangled in my feet,  
rned dark then. As I made an  
yself I grabbed the gate, or  
he gate and my hand caught the  
hat when the gate swung open it  
me right on to my back. I saw  
d my feet; when I hit the ground  
d my feet flew up and I seen this  
at was around my feet was this  
hone wire. The insulation was  
how I recognized it so quick. It  
ere was some insulation still on  
ut part of it was burned off.

right down in my back here, right  
lvis bone. I struck kind of on my  
n the left side of my pelvic bone.  
ne I mean this bone that runs  
hat they sometimes call the tail  
w whether it was the tail bone or  
ck down below here. When I say  
n near the tail bone. The snap  
I felt down in my back here, right  
where I felt the snap.

get up and I couldn't because I  
n my back; I was just helpless.  
vo efforts to get up; I am sure I  
to get up and then I didn't know  
t.

(Testimony of Fred W. Pooler.)

The ground upon which I ground, and some rocks there b I hit a rock or whether I hit the It is like cement, kind of hard, the flat, that packs very hard wh

These 3 rolls of wire I spok poles that was across Marcia S that stands by my gate and the of my garage. I indicate the marked A, B, and C on the E of the defendant. I saw the ma down from those poles. He w sure; he had on climbers and poles and took the wire down. I watch him close, you know; I j went up the pole and I was up the refuse of my garage and man and thought I knew the m no attention to him only that wire down. The reason for his the poles was it had burned ove was laying down on the ground garage. My garage had burned 1932. These wires ran across n I should say was east within a way from my line that goes th garage. In other words I mean property as depicted on defe That garage is in the corner o west fence and the north fence

and W. Pooler.)

The wires were laying down on the insulation was part off of some of were strung over the garage, be- moved from the pole. They were poles; they were hanging to the just connected to the poles, but burned over the garage had fallen and. When I speak of the poles the telephone poles. These wires from these telephone poles and and 5 or 6 days before they were eribed. Then this man that came wires and rolled them up into m inside my fence. Those rolls 3 feet large. I mean each one There were 2 rolls that were over up against my fence. I never [75] t the height of my fence is 3 foot ame, I would say, within about o of my fence.

ou indicate with your cane against Honor about the direction in which against your fence?

ill say this is the fence and the o that the Broadway was running e fence.

u know who put those wires inside

s a man and he said his name,— erstand whether it was Dubal or

(Testimony of Fred W. Pooler.)

I myself saw him put the last roll of wire up and leaned it against the fence; he reached over the fence with it; he took the first roll of wire up and leaned it against the fence; that time he was outside of the fence; he took the second roll of wire up and leaned it against the fence; he took it inside my fence. The two rolls of wire were there; I saw him place the other roll, the second roll, there.

Q. What did you do, if anything, to remove the wire from the fence?  
ing the wire there?

A. I was sorting charcoal out of the yard to put in my furnace to get rid of the charcoal; the boys that was helping me came out from the garage, and one of the boys said, "He is putting that wire over the fence"; I said, "Fred" and I looked up and went over the fence; I was provoked because they had been dug out of the yard over the flat out there and I had been told by the commissioners a number of times that the garbage dumping stopped and when they started to put something in there in my yard, I went over and cutting the wire in my yard, it was cut; I went over and I went down, and when I went down, I was at I said, "Hello Arthur" and I saw Arthur on a big coat so I didn't see his face; I said, "I got a good view you know, what you are doing"; he says, [76] or I says, "I beg pardon"; he was Mr. Garton": and he says "Mr. Garton" or Dubie, I can't say which.

I said "Mr. Dubie or Mr. Dubie"; he says, "You to leave that wire there" and I said, "That is only just be a question of an hour";

red W. Pooler.)

will pick it up." Well I says, "Be  
at the truck picks it up because I  
stuff laying around here, there is  
on the flat now," and then as I  
ek he placed the other roll. That  
le of my yard.

had a coupe and I noticed it had  
. It had the Bell Telephone and a  
with a bell in the middle. I didn't  
or anything but I noticed that. I  
n as he handled the wire. He took  
and got it down and then he was  
ne was rolling it up. I seen him  
his hand and he had it up and  
rate and I went right on with my  
bother anything about it until one  
to me "That man is lifting that  
e boys and I at that time were  
nd the garage after the fire, refuse  
uld say this young man was work-  
neighborhood of an hour. I didn't  
on him. After he told me not to  
be a matter of an hour or so the  
k it up he turned around and went  
venue and I didn't pay any atten-  
he turned the corner of the house.  
upe and drove off.

uary, or March of 1933, that I had  
with anyone else about that wire.  
the man came to my door and said

(Testimony of Fred W. Pooler.)  
he came after the telephone instrument.  
“I came after the telephone instrument,”  
says, “Are you employed by the Telephone and Telegraph Company?”  
he said “Yes” and I said, “All right, I will get you a shovel.”  
He loosened the instrument from the little table—not so heavy as that  
the order like that, and removed the instrument underneath with the telephone wire  
connected to, and he started to go to the house to him, “There is some wire there  
that the lineman left there and I will dig it out.” He said he didn’t have  
thing to dig the wire out, and he said, “I will get you a shovel,”  
I said, “I will get you a shovel,”  
the garage and got him a long handle shovel and brought it and handed it to  
junction of the sidewalk, the sidewalk, the garage and the back gate;  
shovel and he took the shovel and went to the back to dig the roll of wire  
on in the house. I had some other men, a couple of men, they were talking  
come there to see me, and I went to the end, the dining room and sat  
somebody coming up on the back porch, I looked out from the window, my  
dow, the dining room window is about 6 feet long and about 6 feet high;  
it is about 6 feet long and about 6 feet high; and this man was on  
the instrument, and I thought he



red W. Pooler.)

so I raised up out of my chair  
of my window and I could see the  
up against the fence and he was  
back gate at that time and so I  
t to the back gate, or out to the  
her, and as I opened the kitchen  
ing the instrument in on his seat  
m, "I want you to take that wire  
ere," and he looked at me and  
l, "damn you I mean it."

coupe and drove away. That was  
] or March, I don't know; there  
f snow between my house and over  
t 3 inches of the top of the wire.  
t telephone instrument as I had  
I told him to take the instrument  
a at the telephone office said "You  
leave it in there for a while" and  
o he left the instrument there from  
ld say some time in the Spring or  
s shortly after they had come  
etition asking us if they didn't cut  
es that we would have these instru-  
; so they didn't cut the rates so I  
ument out.

came after my instrument was a  
ight but I think he was dark, but  
n up around his collar, his collar  
because it was quite cold in the

(Testimony of Fred W. Pooler.)

The connection for my telephone pole opposite the gate into my yard is a pole that is designated on the map as point B. It runs from that point to my house; it goes past the corner of my house then goes through the bath.

After I was in the hospital I remember a man named Thomas came up there to see me. Thomas, I asked him if he would call the telephone company and tell them that I wished they would take that pole down that there were some children playing on my lawn and I realized that it was dangerous; if they got to playing on it they would hurt themselves. That was the day I was in the hospital; I don't know, maybe I was in the hospital 3 or 4 days or a week before I was gone from my yard when I came to the hospital. [79]

Q. Now Mr. Pooler after you have described, do you know where you were taken?

A. Well I know that Dr. Greig and Dr. Gregg coming after they were called; I didn't know anything about lighting a cigarette for me.

I remember I was in my home when I was being injured. I don't know where I was taken of my own knowledge; I can't remember the bed.

red W. Pooler.)

conscious of the fact that you were  
injury?

time later it seemed to me like I  
my wife's boy was sitting by the

at I was in bed. I believe that Mrs.  
me a drink of water. She did not  
me of the water down but it pained  
vent to lift me up and I couldn't  
ld her I couldn't stand it. I guess  
ome until the next day and then I  
ay Hospital. They didn't do much  
me at the Murray Hospital. Dr.  
at it was just a dirty sprain and  
re to wear it out. They put me to  
e on a cot. I was in the hospital  
eeks, but in the meantime the girl  
in a wheel chair and take me in  
as.

to the hospital for my injury. After  
ital I went home. When I went  
s able to get around on crutches.  
how long I was on crutches but it  
ime. My injuries affected my legs;  
ight use of my legs, and I can't  
ly so far, it seems like I haven't  
ugh to hold my back up. [80]

7 weeks you were in the hospital  
walk?

Gregg got my brace I could walk

(Testimony of Fred W. Pooler.)

I still wear that brace. The l  
slabs in the back about that wi  
my hips up to my shoulders. I c  
that brace. I can stand without i  
I believe it was Dr. Gregg w  
brace. He brought another docto  
remember what that doctor's  
said,—no, at first Dr. Gregg wa  
and then he brought this other  
this doctor lace me and this doct  
no use to lace me and that the  
needed; that they couldn't leav  
only I believe he said 9 days. I s  
I can stand just a little while  
with my cane, but I couldn't wa  
walk from here to that table ther  
I have the brace on at the pres

Mr. DAVIS: May it please  
time we would request permissio  
plaintiff to remove the shirt an  
Mr. Pooler and let the court and  
that he has described.

The COURT: Very well if th

Mr. WALKER: No objection

(Thereupon the witness remov  
ing and exhibited the brace to  
removed the brace and exhibited

Q. Now in your present con  
your brace are you able to stand

A. A little bit. [81]



(Testimony of Fred W. Pooler.)  
Mrs. Gill came over and got our br  
Bernice Anderson came and she u  
day in the morning for about th  
the work, and then I was in bed  
how long, and then I got so that  
on my crutches again and so I u  
My wife was on crutches too an  
and her we used to get ourselves  
That was [82] all we could do sin  
son went away.

Q. And now where do you feel  
of the injury?

A. The pain always was the w  
on my spine; seemed to hurt me  
my breath away and does yet.

After I got home I had pain;  
yet always around my hip, my ba  
is my tail bone, that is always  
seem to affect me there like it  
part. It has affected my bladder  
to have a blanket, a heavy blan  
that I can't feel the water as it  
my bladder; I sleep and it seem  
When I am up my urine seeps  
clothes and stains my clothing. T  
that I have on; I don't wear thi  
suit might be stained, I wouldn't

Q. Now how did it affect your

A. Well they are kind of nu  
can't get around on them good;  
all the time.



ed W. Pooler.)

rest hurt my legs were numb and  
was bathing me this leg here, I  
she put it in the tub for me, that  
ouldn't lift at all, that is my left  
would always put that in the tub  
bathed my foot, but the other leg,  
into the bath tub myself. but it  
awfully in my back when I would  
nd when I went walking I would  
careful because if I stepped on  
of a pebble it hurts my back; it

do you know whether or not you  
t all?

ms like I hit my leg when I was  
I hit my leg against the gate

of the gate I mean this little gate  
of my fence.

ns of discoloration. After I had  
ital my back hurt me so that I  
leg. The nurse called my atten-  
was all black and blue here and  
was all black and blue.

ve any sensation in your legs aft-  
different than the normal sensa-

gs were numb all the time and I  
the time in my leg.

. I showed it to Dr. Gregg and he

(Testimony of Fred W. Pooler.)  
 examined it and he said, I believe  
 a rheumatism started in there.  
 there was any marks on my back  
 remember whether my arms were  
 but my shoulder was awfully lame  
 use my shoulder; I couldn't raise  
 every time I would move my arm  
 that would come up here, a lump  
 the base of my neck, you can see  
 now. I have pains there now; I  
 of pain at times, quite severe. At  
 to move the neck and then there  
 hurt me.

I tried to get up twice after I  
 wasn't able to get up; when I  
 couldn't. I don't know how I got

A man by the name of Bert M  
 Hemenlay were in my home at  
 came for the instrument. Mr. M  
 ing over in Philipsburg. He is a  
 fellow is Grover Hemenlay and H  
 I think he is about 50 years old.

In my blacksmith work I used  
 my hand hammer [84] weighed a  
 quarters. I do not know any other  
 than that of a blacksmith. I was  
 until I was 17 years old and then  
 blacksmith business. I could not  
 and three-quarter hammer now;  
 blacksmith work now because I

ed W. Pooler.)

pain is too much. I had not been the injury which happened to me. Prior to the injury I was able to run and jump and could do my work with.

Now that that wire had come unrolled when you left your house that day, June 20, 1933?

To which we object on the ground that it is irrelevant and immaterial and not the issue involved in this case.

Overruled.

Exception.

I didn't know it and I didn't know either because I came in the back way.

When the wire then, it was dark and there was no light on the sidewalk and I came in from the grocery where I used to do my grocery store. I went over to Mr. ... I don't know just what time it was, but it was dark.

I had no reason to believe that the wire which the telephone lineman had strung over my fence, leaning against it, were dangerous to my life or limb; didn't see any danger at all.

Do you object to its being left there?

The best place they had been dumping it was on the flat there and costing the telephone company thousands of dollars to clean it up now, and I testified against that garbage [85]

(Testimony of Fred W. Pooler.)  
dumping to the commissioners;  
I was very particular about my  
it beautiful in the Summer time  
that stuff there; it would be a b  
But at the time I told the liner  
cause they were putting that the  
all this garbage dumping that b  
house. Sometimes they would du  
garbage right on the street that

I got the injury to which I h  
legs, to my back, to my shoulder  
that fall when I entangled my  
The fall took place right at th  
premises.

Since leaving the hospital I  
Dr. Gregg was out a time or t  
and he wanted me to come over  
have some more X-ray picture  
take some X-rays at the Murra  
went in. I did not go up to b  
have had a doctor since then, I  
been to his office. When I fir  
I used to go every couple or th  
have been going there ever sinc  
been going only I guess two or t  
I have gone there on account  
Carmen took X-ray pictures  
treated me. I had a bill from th

Q. What did they charge you

Mr. WALKER: Objected to

ed W. Pooler.)

aterial and nothing to do with the

A charge for medical and surgi-

Yes, the hospital. I will withdraw  
ne moment.

The question is alright; is it in

]

We have an item of \$450.00.

You will have to lay the founda-  
ble cost.

ces did they render for you at  
e than taking X-rays?

nurse used to bathe my foot and Dr.  
nd seen me once a day. He told  
much of anything they could do  
nd the nurse told me to not get  
s Hill, that those backs were bad  
g time.

S: They fed me; they brought me

I occupied a bed in the hospital  
d the brace for me, the brace I  
rt and jury. They gave me a bill,  
ervices and hospital room of 52  
ays of my spine and brace for my  
t. They sent it to my house from  
pital. I believe the amount of it  
\$370.00. It could have been for  
tems mentioned. The last bill I  
tal and got it, and it was \$380.00  
lars. My present bill is \$287.00.





d W. Pooler.)

fence, the west fence from the  
will say 15 or 20 feet, and about  
it along the board fence I had  
the strawberry vines are east  
right along the west fence south  
I have rhubarb plants. I guess  
about 2 feet from the fence. When  
up and growing it runs right up  
The rhubarb plants I think are  
in the garage south. East of the  
we have a strawberry bed, which ran  
feet south from the garage and  
probably 20 feet from the south  
patch to the garage and I think  
. The strawberry patch is about  
south wall to the garage to the  
ts were plants that came up every  
what I had to plant every year.  
s were about 8 or 10 feet east  
e, from the walk that runs to the  
are in a row and I will say about  
side of the walk running along  
g east; running east along the  
d then we have a poppy bed that  
They are in between the peonies  
; it is a round bed; and then I  
further to the east a bed of,—I  
f that; they are white flowers and  
ear. And then closer to the walk  
garage, in between the walk that

(Testimony of Fred W. Pooler.)  
 goes to the garage and the wall  
 back gate there is a rose bush,  
 my wife built there a bird bath  
 concrete slabs about 2 feet wide  
 concrete and got a form and  
 built it so it was turned on top  
 that and it was so she could  
 birds.

I also have vegetables in there  
 toes and carrots and some peas.  
 and peonies and strawberry bed  
 up every year. The vegetables ord  
 every Spring and the potatoes.  
 vegetables in the Spring of 1933.  
 wife and had no time. The r  
 berries and rose bushes contin  
 Spring. They didn't need any  
 are beautiful. This year the r  
 thing I believe like 75 blooms on

Q. That is 1935, but we are  
 Don't become confused.

A. Well the peonies every y  
 the neighbors used to take the  
 them to my wife at the hospi  
 lovely in the Spring of 1933.  
 blighted that year. There wa  
 blighted; [89] they blighted a ye  
 ago we had a lovely crop; we had  
 year.

The concrete walk running fr  
 along my south fence to the ga

and W. Pooler.)

er of my west fence is composed  
hat I got at the mine. They gave  
mine and I made a walk out of  
rtion right close to the gate, that  
de a form but it didn't come out  
ck wasn't long enough, and so I  
nd put it there and filled it with  
ock was about a foot thick and  
he walk. I would say there was  
down from the end of that block  
ween the gate post, or right at

near as I can fix the time, be-  
00 o'clock on the evening of June  
re the wire was not on the walk  
I came in through the gate over  
d I am sure there was no wire  
tting quite dusk at the time. I  
e time whether it was against the  
ause I came in through my back  
s of wire I didn't notice. That  
n the house I read a little bit and  
ried to sleep and I was so worried  
t I went to the garage and I had  
I make the bed in the car, and I  
he car and I stayed in the garage  
ny and the next morning I was  
aid down about 11:00 o'clock in  
to sleep; and I just woke up the  
0th just before my accident, just

(Testimony of Fred W. Pooler.)  
long enough to get my clothes on  
and hands, and I went to get a  
was going to build a fire and throw  
ashes and I lifted the [90] ash  
pan from the stove and started  
gate along the walk, along the  
my property; I had the ash pan  
sun struck my glasses and blind  
to wear glasses, I think, about  
wear different glasses for reading  
times. They are double, this set  
when I read, and this is the other  
double vision glasses. I had got  
hadn't had them very long. The  
glasses I had. I never had more  
any more after I got hurt. The  
I had before I got hurt. I had  
I had on very long when I got  
different pair of glasses when I

Q. How long, prior to the  
been aware of the fact that you  
good?

A. Well my vision was good  
I could see good but I had to wear  
the time. You understand I didn't  
all of the time, and not now, because  
don't fit anymore, but still I can  
them than with the naked eye. I  
of glasses on the night of the accident  
broken in the accident. I could

ed W. Pooler.)

The accident happened right at the  
the walk running out to the west  
with fence, a few feet this side of  
the gate and the house, a few  
feet.

entangled in the wire and I fell  
opened the gate which flew out; I was  
stunned like my feet were tied, and  
I fell. It was after I hit the ground  
I looked for the wire. My feet kind  
of and I just got a glimpse of the  
ground and my feet, so I realized what  
from that glimpse of the wire I got  
to know it was the last roll of wire that  
I had put in my yard. I got a look at  
my feet lay on the ground, after my fall,  
on the ground. Just at the time that I hit  
the ground flew up so that I got a glimpse  
of the ground at that time I saw some of the  
ground off the wire.

the wire; I believe it was a single wire  
which was partly burned off and had been  
burned rather, and I think the insulation  
was a gray, you know how a wire will  
last a number of years. I am quite sure  
of the wire, I wouldn't swear but I think  
of the wire. I didn't examine the wire close  
up, it looked to me, as near as I can  
tell, was a single wire. I had seen the  
wire on and off, and on, over a period

(Testimony of Fred W. Pooler.)  
of 7 months before my fall, leaning  
back fence. I would say it was  
positive because I never examined  
enough. It was left there in  
November, and on the 3rd of Decem-  
ber snow and it drifted in there  
and covered over until the snow was  
was very busy with my sick wife.  
I would go out would be just  
empty the ashes.

The insulation it had on it was  
telephone wire or electric wire  
with this insulation. I never  
whether it was rubber or what  
it must be some kind of cloth  
colored and it showed age. As  
figure my impression was it was  
of insulation. I think there [9]  
rubber underneath. I know it  
In my experience as a blacksmith  
had occasion to see the difference  
wire and electric power wire, but  
thing that blacksmiths don't work  
only wire I ever handled is the  
mobile and I used to handle the  
to fix my car, and that was the  
occasion to tinker with electric  
as a telephone wire as distinguish  
wire because I seen the man put  
is why I know. I seen him take



ed W. Pooler.)

one reel there; and the man told  
ut the first two reels there, and I  
none wire because I seen him take  
n him put it there.

ed to the boys, I referred to the  
re there helping me clean up the  
and I was going to start to build  
e of those two men is Bert Malloy  
ver Hemenlay.

two men who were in your home  
e to take the phone out?

stepson is very good to me, he  
and Bert Malloy lived the next  
ss the fence and he came and

this lineman very close. I just  
limbing around them poles and  
way with a coupe. A coupe is a  
obile; the top is over the one seat.  
s man making a remark that the  
it up.

in order that we may get your  
n a truck and a coupe——

I don't think that is of any con-

[93] proceed without using too  
ask questions and you don't have  
our purpose in doing it is.

will try to reform my question.

You don't have to explain to the  
urpose is in asking your questions,  
just ask the question.

(Testimony of Fred W. Pooler.)

The WITNESS: A coupe is a truck is kind of an open box behind it has an insignia of some sort, a circle with a star in the center of the vehicle that he used. If that vehicle was parked behind, an open place behind to park it was closed; it was not an open conveyance. I saw of that vehicle he had parked behind the south fence close to the gate.

I saw the imprint of this wire in the ground. I came out of the hospital. I was there for seven weeks. The wire had laid out along the edges of the wire, that was in the ground, and when they had dug it out of there it left an imprint.

Q. Who was the Mr. Gardner who was down there when you said, "I

A. He worked for the Telephone Company. I don't know if he is in their employ now, but his wife and mine were great friends and me, well we were not great friends. I knew each other and I always saw the count of the two women being su-

I requested this man who carried the telephone instrument, to remove it from my yard, and I gave him a shovelful of money and he didn't do it. The next time the one connected with the Telephone Company to move the wire, was through Mr. Gardner who was in the hospital. [94] I wanted to know I was concerned about it at that time. My children were going to mow my

(ed W. Pooler.)

sidewalk at that garage, over here,  
here, along in here somewhere.

I consulted a doctor, prior to my  
Carmen.

doctor prior to the 20th of June,

s that mean before or after?

accident?

accident?

nothing the matter with me that  
a doctor, no. There was a doctor  
use to see my sick wife.

you were concerned, when was the  
June 20, 1933, that you had been to  
consult a doctor with reference to

t my hand hurt; I got a piece of  
I believe was the last time I was  
s down to St. James' Hospital and  
ated on my hand and I believe it  
elds and another doctor who did.  
lds was there when they gave me

up to the time of your accident,  
th arthritis?

at?

know?

(Testimony of Fred W. Pooler.)

Q. Well of course if you did not  
you had been troubled with it—

A. Maybe if you had spoken  
language I would know what it

Q. I am not an expert on me

The COURT: You would know

Q. How often from the 5th  
to the 20th of June, 1935, did  
leaning up against the fence?

A. Well before the snow came  
every day or 3 or 4 times a  
dozen times a day.

And when the snow was there  
you could see 2 or 3 inches, snow  
sticking out of the ground in the  
an ash can against the west fence  
of the concrete sidewalk. That  
ash can and I think it is about 1  
I will say a little over 2 feet high  
I recognize what is on the paper  
Exhibit No. 2 which you show me  
that as a photograph of the snow  
my yard.

Document received in evidence  
and marked defendant's Exhibit

Q. Directing your attention to  
finger, is that the ash can that you

A. Yes sir.

ed W. Pooler.)

irect Examination.

: When I requested Mr. Thomas  
phone Company, was after I was

u told Mr. Gumm that the only  
ich you had gone to a physician  
ose of removing a piece of steel

a number of times I was at the  
e I got my ankle broke.

ber what year that was. I was  
the Emma Mine, and I will say  
s ago. I had recovered from that.

doctor for other purposes; once  
l lumbago and Dr. Frisbee put a  
back from here, around part way  
t was 7 or 8 years ago.

one to a doctor at any other time?  
a piece of steel in my hand, there  
re yet; I was down at the Murray

ars ago, I guess; it is a long time;  
ou, but I will tell you that Dr.  
ng doctor then and he cut for it  
e it and it was in there all winter  
y, and it was the time of the panic,  
re all down and I was' out at the  
piling lumber and it festered and  
on in there. The blood poison got

(Testimony of Fred W. Pooler.) started when it first got in there, to cut any more and he said he got loose in there, and it festered. He got part of it, but this part the hand yet.

I remember another time I went for treatment for injuries. I went to a doctor I forget his name now. I went to work and got one of my ribs hurt; it was early in 1932, I believe and he was the one who treated me. A fellow crowded out [97] there towards the Ninth Street and tipped over on the side and I fell on my ribs, or he thought it was fractured and he had an X-ray. He just laced me up and I was alright in a few days, or a couple of days and I go to the hospital; I was at my work and I never went to bed. I believe it was early in 1932; I think it was in 1932. I think it was in 1932. It was before my accident in my opinion. I had recovered from the accident of any other time that I had gone to the hospital.

The Dr. Shields who was present at the time the piece of steel taken out of my back was the one who is sitting here listening to the testimony and he is now in the back end of the courtroom. The Dr. Gregg, whom I testified to, was the one who has been sitting here at



red W. Pooler.)

ecross Examination.

red to some X-rays being taken  
r injury?

at Dr. Gregg told me; he told me  
ictures and I remember the nurse  
me down and took another X-ray  
ny X-ray pictures they took, when  
ne hospital, I don't know, but some  
time elapsed and the nurse came  
a little wheel buggy like a bed and  
the X-ray room.

S: That was in the Murray Hos-  
just exactly tell you how long it  
ident. Dr. Gregg could probably

itness Excused. [98]

---

R. H. F. CARMAN,

s on behalf of plaintiff, being duly  
s follows:

irect Examination.

S: My name is H. F. Carman; I  
ontana, and I am a physician and  
practiced my profession 28 or 29  
a. I received my collegiate work  
of Illinois, the State Normal Mis-

(Testimony of Dr. H. F. Carman. souri, studied my medical and at the Illinois University and from that school of M. D. A internship at St. Mary's Hospi I took two courses of internship, Hospital, and one at Augustana and then I immediately came to been admitted to practice medicine the Montana State Board. I am medical fellowships, the American State Medical and County Medical in my practice of medicine and surgery at Anaconda, and practiced there. My practice was a general practice came to Butte, and have been in My practice in Butte, has been general surgery and medicine, and I have The equipment which I have for general electric equipment,—the S

In my practice I have had occasion who suffered from Trauma, or injuries been quite a part of my practice. small mining companies, not large the course of my practice relating companies I have dealt with men and [99] injured.

I know Fred W. Pooler. I met 1933, at my office, 415-17 Metals I my office I am associated with D

. H. F. Carman.)

ing Fred W. Pooler was when he  
ination and treatment. He is the  
ooler who sits with you and Mr.  
ognize him as my patient. I have  
October, 1933. I first gave him  
made the examination personally  
ion disclosed a man suffering from  
lder, neck, legs, from violent in-

just tell us what condition you  
that indicated to you that he was  
injury?

s disclose the most and if you want  
em I will have to have the shadow

to them, I found extreme tender-  
bar region, small of the back, or  
m, the sacro iliac joints, the part  
en the hips. His legs were swollen  
own; he had a mass in his right  
s to be an enlarged thyroid gland;  
e is very stiff; he is unable to raise  
e the level of his neck or shoulder  
very great difficulty in walking  
ort of a cane. I had had an oppor-  
e his ability to rise from a chair.  
ears his hands on the arms of a  
pport, and with the aid of a cane  
om the chair. He made complaint  
He said the pain was felt in his

(Testimony of Dr. H. F. Carman. lower back. The tailbone in ordi the same as the lumbar and sacrum enough up. [100] I have brought body with me and which I now ha

Mr. DAVIS: May it please purpose of identifying certain b between counsel for plaintiff and exhibit which I hold in my hand a venience we will mark plaintiff's identification, may be used by w tiff and defendant for the purp bones and explaining their relatio It is to remain here for use by well as for ourselves.

We offer this Exhibit A in evi poses in the case, and to that Gunn has no objection.

The COURT: It may be admi tion.

Object marked plaintiff's Exhib in evidence.

The WITNESS: Exhibit A i pelvis, a part of a human body, w tion or the basis upon which the l up rest upon. While this bone sacrum, is really the beginning also a part of the spine. This pel and simplicity I will just divid and call this one here and this

e. H. F. Carman.)

n. The side bone here that wiggles  
ply the ilium. Of course anatomic-  
d into a number of bones, but for  
oses it is the ilium. So the pelvis,  
it, is composed of three bones, and  
is the key or the arch or wedge  
ip bones or the ilium. You can see  
Now it joins the sacrum, joins the  
s, called the sacro iliac joint. Now  
at which no doubt [101] you have  
al about is this joint here, which  
and the ilium together. Now there  
at secretes a fluid that lubricates  
these two bones and this is con-  
alled and is a movable joint, the  
two of them, one on each side. But  
is altogether, bound together with  
ndons, this is a fixed solid girdle;  
ether and you cannot pull it apart  
orce. This is a solid ring around  
one, you call it the hip bone and is  
um and ordinarily is the bone you  
is in the rear is the sacrum; and  
t the top of the sacrum and going  
Now the spine, you know, is com-  
ras. The regions just above the  
ten call it, the small of the back,  
e lumbar region. There are five  
small of the back, or the lumbar  
are numbered from above down.

(Testimony of Dr. H. F. Carman)  
So the fifth lumbar fits on top. The  
Now this is a fixed body, the pelvis  
impress upon you that this is a fixed  
lately immovable because this joint  
but it is a bony girdle. And then com-  
mences the fifth lumbar; on top com-  
mences the twelfth dorsal which  
and then the bones of the neck,  
Then this fifth lumbar is the  
movable spine and the fixed girdle  
here your spine is pliable; you  
or backward, laterally, from side  
here, the girdle don't move except  
area in the sacroiliac joint. So  
injury and deformities of the spine  
beginning of the movable spine with  
So the fifth lumbar vertebra has  
[102] of argument because that has  
ity when it comes to the relation  
the hardest to detect at normality  
in X-raying your body the long bones  
demonstrate in the X-ray, and  
shadow, and get a shadow that a  
body can interpret an injury easily  
you get down into the pelvis your  
cult. And, let me say now that an  
ture. An X-ray is a shadow. I  
between that light over there and  
here you will see a shadow, that  
so in making your X-rays you th



r. H. F. Carman.)

te the body and the bones and the  
body that that light goes through  
. So it makes our interpretations  
s rather difficult sometimes to in-  
rance this pelvis. If we lay a per-  
like this, and shoot a ray through  
rates the different densities, the  
ll go through will throw different  
y will cross over and be sometimes  
and especially for laymen in these  
adows. So in interpreting deforma-  
tions and fractures of the pelvis  
t is a little more difficult.

give different names to the sacrum.  
ne most common, but really the tail-  
dle piece tied on there, plus a few  
That is the coccyx. So the girdle  
e bones becomes almost immobile.

ect by an X-ray whether or not the  
en out of its normal position, for  
ne way or another. You could de-  
not the sacroiliac [103] joints to  
erred were separated. If an X-ray  
would show that the sacrum had  
rd into his body so that it was out  
that would affect his general condi-  
uld be reflected in his actions would  
mount of displacement or amount  
bones plus the injury to the soft  
hen the soft parts are affected the

(Testimony of Dr. H. F. Carman) the pelvis is quite rickety, but when put together by ligaments and tendons it is a strong body.

Q. Supposing an X-ray were taken of the left sacroiliac joint, the left side where the sacrum joins the side bone, and the two were separated approximately one-eighth of an inch, could that be detected by an X-ray?

A. Well you are getting down to a pretty fine, one-eighth of an inch.

Supposing it was separated, would it be the other one and judge then whether it is more or more fixed than the other is. If there was a separation in the sacroiliac joint, it would affect the articulation of the spine and it would reflect itself in pain and inability to rise from a chair, and it would require a great deal if you have torn the ligaments and tendons that hold your joints together. In other words, it is weakened like the earthquake which causes cracks in a building and when the cracks are there they lose their support and they fall down, and the same thing with articulations in Mr. Pooler's body if the sacroiliac joint had been separated, would be pain and lack of support to the body. The body weight rests on that sacroiliac joint and it would affect his locomotion because when he has lost his [104] support it is a difficulty and with pain. The sacroiliac joint is a part of the nervous system.

e. H. F. Carman.)

y run through there. The spinal  
own terminates at the first lumbar  
ed divides up into what we call  
horse's tail. In other words the  
is divided up into little so-called  
telephone wire or cable would be  
and frail out a cable and it will  
a lot of other wires, and you take  
f of it and you get a very good  
is what happens to the cord. They  
spinal canal and down through the  
at each segment some of the wires  
e holes, either in front or back and  
all the lumbar plexus and sacro  
in unite in different bundles with  
n the sacro plexus and lumbar  
pass on down. So that part of the  
goes right down through this open-  
is the conjunction of the spinal  
es or nerves as I have referred to  
t of them, right down to the tips  
back up to your brain center.

a heavy blow or trauma upon the  
ve, from a nerves standpoint, or  
y standpoint would depend upon  
ow is severe enough to break the  
e nerve it may paralyze the nerve

l it affect the legs, even to the tips

(Testimony of Dr. H. F. Carman)

A. If your blow is severe enough to injure the nerve to the extent of paralysis, it would cause paralysis.

Q. How would it affect the nerves of the back? [105]

A. Well if you should injure the nerve so that impulses don't pass down the spinal wires you get a complete paralysis down.

Q. What effect would a heavy blow to the sacrum have, or upon the urinal nerve?

A. Might not have much on the urinal nerve, the center of micturition, that is, the lumbar cord.

Q. What effect would a heavy blow to the back, such as a man falling on the ground and striking near the spine to the left, of a man who weighed 150 pounds?

A. I can tell you what it might result in. It would result in injury, depending on the hardness of the blow. The harder the blow the more the injury, the result of the blow would be the damage it does to the nerves. It would reflect itself in the part of the body it is hit in the part of the body away from it, depending upon the amount of destruction it does to the nerve. How it would reflect itself in the part of the body would depend on the severity of the injury. It might be paralysis, paresis, or slight paralysis. Some men with poor action of his

e. H. F. Carman.)

e has lost control entirely that is

system is controlled by two sets  
is an argument over this but as  
ware there are two actual sets of  
rol the circulation, one that dilates  
and one contracts them, so the cir-  
e control of a nervous system. A  
t itself in the circulatory system  
ur contraction; and a blow might  
he circulatory [106] system if it  
o excite the vessels. One will pro-  
and the other will produce a con-  
ood vessels.

erent centers of the spinal cord  
erent functions. For instance mic-  
eation, bowel movement, and three  
the cord. If you have paralysis  
irect injury, the centers that con-  
an loses control of his bowels or  
is bladder. When you lose control  
at means you are not able to retain

Fred Pooler in relation to a back  
de some X-ray shadow graphs of  
have taken those pictures, strung  
wo years. Mr. Pooler had been a  
d claims he weighed 185 pounds,  
ge and he is very well nourished.  
ery strong man. When I first met  
much debilitated. I took his weight



(Testimony of Dr. H. F. Carman) and it was 175 pounds. I stripped him of his brace. He has a hard and he can do that but a very the aid of cane or some support is unable to bend forward. He won't pick thing up off the floor because he can't do it. He cannot hold himself from falling. He cannot bend backward or lateral movement, side to side. All he can do, and that is for a short time, he is stripped of all his support, is to get in a position, and not an erect position, and he cannot get himself in an absolute position, but bends forward. From that position, if he were to fall, it would be out of the question for him to work as a blacksmith. At the present time he works as a blacksmith. [107] I don't do that kind of work that Mr. Pooler can do at that time,—no manual labor. Basing my examination of Mr. Pooler on the present evidence, I don't think he will ever be able to do any manual labor. I don't know of anything that could be done to correct his condition.

Q. Well what treatment if any would be helpful to him?

A. The treatment would be a surgical operation, is cutting down in these bones, chiseling away and making a furrow and then taking a piece out of his shin bone and putting a plate across here, the sacrum, tying



(H. F. Carman.)

stiffen up his foundation. In other  
girder across there, an operation  
is a stiffened bony structure. You  
stiffen up the ligaments and muscles but  
if you would make this a fixed joint.  
You take the weight and support from the  
ligaments.

the brace which Mr. Pooler wears.  
It is a brace and a rather elaborate one  
than mine. He cannot get along without

to walk without it?

He walked for me.

and long without it; he would wilt.  
I took X-rays with me and you may see

May it please the court in the ex-  
amination of X-rays we wish to set up a shadow  
of the bone now?

Surely.

Q: I heard the testimony of Mr.  
Pooler of his testimony with reference  
to the hospital.

The testimony of Mr. Pooler showed that he  
was admitted to the hospital [108] at the Murray Hospital for  
several weeks; that he had been given  
special attention by Dr. Gregg and sev-  
eral other physicians who called on him there; that  
they attended to him, wheeled him around in  
a chair that he was fed; that they took some  
of his blood and provided this brace, and for

(Testimony of Dr. H. F. Carman that they had given him a bill, a f  
 Basing your answer upon your  
 pital work and as a physician a  
 you not say that that is a reason  
 amount of services rendered by  
 pital. The items of that bill  
 Services—\$100.00; Hospital Room  
 of Spine—\$20.00; Brace for bac  
 Total—\$287.00.

A. I would say that is quite re

Q. You also referred to a tu  
 his neck which you thought migh  
 the thyroid. Could you tell us fr  
 tion of Mr. Pooler what the con  
 that tumor was?

A. No, I don't know positive  
 was.

Based upon the history of this  
 what might be the cause. My o  
 to the injury and strain and f  
 about.

Q. How would the result of  
 relates to the tumor, affect Mr. J

A. Well it is very tender and  
 say tender and sore, it is very te  
 when you feel of it and try to ex  
 him very painful.

It would affect him in doing  
 smith; he cannot with the compl  
 by examination; he could not use

r. H. F. Carman.)

tell the court and jury what the  
99] to be on the circulatory system

circulation is very poor; his heart  
and at examinations that I have  
out two beats out of a minute.

positively, from my examination  
at the condition of his circulatory  
ed, the missing of two beats per  
art, could be attributed to the acci-  
I have testified. A lot of people  
et beats who have not had any acci-  
ent may be a contributory factor  
his circulation is bad because his  
n from his feet up to his knees,  
heart is not keeping up the circu-  
that we call decompensation.

a man had no evidence whatever of  
had had no evidence of missing of  
had had no swelling of the legs or  
sort, prior to the injury, and then  
e injury to which he testified, fall-  
near and just left of the sacrum  
part of his back, and your examina-  
er and your experience, would you  
that condition could have resulted

or not say that it possibly resulted

ble, yes sir very possible.

(Testimony of Dr. H. F. Carma

Q. Now Doctor, take a man  
foot 7 inches tall who weighed  
were to have his feet entangled  
be falling and reach and try to  
gate went open, and he turned  
the ground from a walk which  
ground, would you or not [110]  
be sufficient force in a fall of  
a man as to have caused the inju  
described?

A. I should say it could be.

Q. Basing your answer on y  
Mr. Pooler and your experienc  
say that the injuries from wh  
caused by a trauma or a blow?

A. They appear to be cause  
blow.

I would say it was a severe tr  
condition resulted from an injur  
from disease.

Q. Now will you please tell  
clusions were as to the condit  
basing your answer upon your o  
ination of Mr. Pooler and yo  
physician and surgeon,—I mea  
diagnosis. Just tell us what con  
from the injuries he sustained?

A. Mr. Pooler has a tumor o  
side of his neck, apparently th  
thyroid gland, a goiter, which  
has a heart that misses on an a

H. F. Carman.)

minute—it is no leakage of the  
g of the heart is fairly strong and  
e these irregularities of missing.  
tender on palpation. By palpation  
his back. And when I say ten-  
r tender. It won't bear the weight  
vo pressure without him making  
out the soreness of his back, from  
the small of his back down to the  
e, as he terms it. He is extremely  
crum and sides of the sacrum and  
e joints, both of them, there is  
relling, a marked ridge all across  
very tender and painful to palpa-  
region is very tender but not so  
area. He has lost all control of his  
clothes and has to keep a blanket  
t to protect his bed. His feet are  
itis up to his knees. There is ap-  
ion of the left sacroiliac joint and  
upper part of the sacral,—sacrum.  
please take the Exhibit A and in-  
and jury what you mean by that  
sacroiliac joint?

e this quite thoroughly yesterday,  
sacroiliac joint, one on either side.  
it is the giving away of the sup-  
es, ligaments, tendons and tissue  
ner, allowing a giving of the bone  
ing that joint. The fracture is  
ne as a fracture through the outer

(Testimony of Dr. H. F. Carman)  
wall of the spinal canal. This  
where the remaining part of the  
ing the spinal cord pass down  
through these openings here whi  
num. There is a separation in  
the canal between the first and  
I told you yesterday these vertel  
together, but they are still co  
vertebras. There is quite a mar  
the sacral into the sacrum. You  
cavity. The upper part of it i  
cavity now is straightened and  
forward into the pelvic cavity of  
the sacrum here; instead of bein  
curve down here it is bulging o  
of it.

You cannot positively diagnose  
this is a [112] fracture of the s  
aid of the ray, but the extreme pa  
to move and tenderness and a  
those anatomical changes. You a  
your diagnosis without the use  
there is a possible separation of  
the extreme symptoms, the loss  
being able to stand, not being ab  
being able to support his body.

In the course of my examinatio  
I took certain X-rays or shadow  
hibits, plaintiff's Exhibits B to  
seen before and they are rad  
Pooler. They were taken by my



(H. F. Carman.)  
... General Electric. They were  
... assistant and I was present. They  
... my supervision. They have not  
... changed in any respect since they  
... y correctly and truly depict the  
... Pooler as disclosed by the X-rays  
... pictures were taken. I don't know  
... es were taken and I did not bring  
... t the exhibits for identification to  
... w testified were all taken by me  
... the ordinary course of my exami-  
... nent of Mr. Pooler.

We offer them in evidence.

Admitted without objection.

... plaintiff's Exhibits B, C, D, E, F,  
... in evidence.

... r, calling your attention to plain-  
... which is an X-ray picture, or  
... the body of Fred W. Pooler, will  
... e court and jury examine that pic-  
... r us the developments and condi-  
... cated by that picture?

... e preliminary; as I said yesterday  
... ve the most covered up part of the  
... issues over it and there are four  
... that shine through that pelvis  
... art of the body. Now this picture  
... picture, I don't mean picture; it is  
... is a shadowgraph. It is shadows  
... ut shadows show an outline of the  
... v this is what we call an anterior,

(Testimony of Dr. H. F. Carman) posterior, that is from front to back to plaintiff's Exhibit "B" which v Now the patient lies on a table of tube is up here a distance away. The plate is under the patient s from above and shines directly the pelvis and body and records the plate underneath. So when shadow the patient is on the tab film underneath and the radiogra though you were looking directly ing in front of him, looking at th

This shadow depicts the ilium it yesterday. The other one is the side. This shadow between them we were studying yesterday, on This little dark line coming down is the sacroiliac joint, that is these bones here makes that that line that separate it, that gether, the joint that is held these dark spots that you see there, very faintly here are the what we call foramen through right over there is the top of the Now as I told you yesterday this beginning of the movable spine, f your neck and to the base of your spine that bends and twists [114] the flexibility of the body. As I that the beginning of this part

r. H. F. Carman.)

the lumbar, or the small of the back, vertebrae commencing from the bottom number this one here Number 5, . . . They don't quite all show. That is the one that is most distorted, I mean any other bone in the column beginning of the movable with the

call your attention again to these sacroiliac joint on both sides. Now any process coming out on either vertebra all the way up. There is one and this one is plain. That is the reverse process because it runs out from the vertebra.

At D we have another view of the man looking directly at the man when you look through his skin and muscles and blood vessels and take a peep at the shadow of

Now you Exhibit C, which is the same as Exhibit B. I think you have any trouble at all in seeing this front view and seeing that this is the left sacroiliac joint is very much distorted here. Do you all see that? You answer me, just say whether you see

This crack on the right hand side of the man you face it indicates to me as a diagnosis that that is the result of the fracture at crack. The crack is quite large

(Testimony of Dr. H. F. Carman.)  
 and that is the separation of the  
 about which I have previously te  
 call your attention to the differer  
 this joint here and this angle in  
 right side [115] and that on the  
 you see the difference in this note  
 Now you see that this sacrum on  
 fit up into that angle; does fit up  
 this side much closer than the a  
 The position which fits the better  
 right side. The matter for you  
 if the parts fit up into this angle  
 side than they do on the left side  
 penters I don't think you would h  
 seeing that this side is a much b  
 side is a much worse fit than the

This joint here is separated.  
 left joint, the left sacroiliac joint  
 it? Are you satisfied that you s  
 dition in this? I am talking no  
 sacroiliac joint. This piece of b  
 away from the sacrum. This is  
 This crack is larger,—this is the  
 on the right.

Another shadow I want you to  
 to thinning out of the bone. An  
 or trauma, which is injury,—by p  
 cast it thins out the calcium in th  
 over a bone will thin out the calc  
 is thin and when the bone is thin

r. H. F. Carman.)

um; it is thinned and the rays go  
se, as I said, the reason we get  
ferent tissues is because of the dif-  
the tissue. The density of the tis-  
s—on the left side you see that is  
ough here, and I took a number of  
show you they all show the same.  
ways shows a darker area here be-  
ed out. Now another point I want  
ention to that don't show quite so  
iogram and more so in others that  
ard for you [116] to see and that  
o vertebrae of the sacrum,—these  
You are looking at it from the in-  
is going through and showing it  
e. Those two vertebrae are there.  
y this is the canal that I am stick-  
to. This covering over here is the  
I mean the back wall. I am now  
ntiff's Exhibit A. This is the back  
al canal. Now this shadow here  
ight across to there. There is a  
s wall, this that I am showing you  
ce. I am now showing you Exhibit  
a in the same position. The exhibit  
was Exhibit C and this one is Ex-  
two pictures Exhibit C and Exhibit  
all stereo pictures. A stereo picture  
an put them in the shadow box one  
d look at them and give us a second

(Testimony of Dr. H. F. Carman. dimension, or a third, just like you old stereo pictures that we used with in the parlors of our sweethe see the second dimension of the r had the shadow box and took a lo just like you were looking at the p

Now I again draw your attention similar to Exhibit C, to this break break on Exhibit D which is the sacrum, this line, the separation of the sacrum is very plainly seen, than it is in the other. I have marked the point I have referred to as I have indicated on Exhibit D with ing in the direction, and the arrow represents the crack about which fied.

Reverting to Exhibit C for just marked with [117] the letters C- Exhibit C about which I have t shown the separation of the sacro also indicated by the letters C-2 left side of Exhibit C which show because it had become thinned ou dicated by the letters C-3 the point where on the left sacral joint the away from the sacrum. I have in ters C-4 and C-5 the points which ference in the notch on the right which indicates as I have testifie



Dr. H. F. Carman.)

the right side than on the left. I have indicated that the iliac crack on the one side is wider than on the right. I want to draw your attention on this picture to correspond to the one on the other. I will mark the point with the letter E-1. I will mark the point which indicates the crack in the sacrum. Now that calls attention to the fact that the letters the points about which I speak are on Exhibit C.

I refer to plaintiff's Exhibit E. This picture was taken in the same manner. You see that the face of the man and this is the same. These two bones are his ilium. Now I draw your attention to the same fact of the displacement of the posterior or back wall of the spinal canal at the sacrum. I have marked this point on the picture with the letters E-1, and to that area I draw your attention to this fact, that this side of the lamina on the left side of the lamina is displaced. The shadow here should come straight down and that shadow there; and instead of coming straight down and misses it by over a quarter of an inch when the lamina below is separated.

I have indicated on Exhibit E with the letter E-1 that it indicates the separation of the back wall of the spinal canal and [118] sacrum. You see that the shadow which it on the left side should come straight down there; instead it is thrown down and to the right. E-1 to me looks like an open space. I draw your attention from the upper part of the

(Testimony of Dr. H. F. Carman  
sacral wall—see that crack then  
from there to there.

I will not change my exhibit a  
referring to the same spot that I  
in Exhibit E, and I have marked  
identical spot with the letters G-  
placed on plaintiff's Exhibit G in  
tion of the posterior wall and the  
shows a little different. The line  
the top and arrow at the bottom s  
of the separation. That shadow s  
all the way across and instead it  
and then comes out here and lo  
edge. That is that area that has  
calcium.

While here I want to call your  
difference in this notch and this  
and right side. I have indicated  
right side with the letters G-2 and  
left side with the letters G-3. T  
the left side represents the sacra  
one here is on the right side—the  
sacral notch and the separation o  
You can see the difference in this  
turned over and you are lookin  
makes this notch much narrower  
than on this side. If you are a  
see that is not a very good joint.

Now this is Exhibit F and I wi  
let you look at its face. Here is  
ment that I have been talking abo  
part of the canal. I have indicate

Dr. H. F. Carman.)

of that separation of the posterior  
the spinal canal looking from the  
the man. Now as I turn it over I  
from the back. The portion of the  
looking at was the man's face. As  
Exhibit F you are looking at the  
have that dark area on this side,  
a thinning out of the bone and the  
it easier and it shows dark. This  
Now that runs through all of these  
le you are here I have three more  
We have been looking heretofore at  
and back.

We are considering plaintiff's Exhibit  
look at Exhibit A from the front and  
-we will turn it over and lay him  
your patient is lying on the table  
heretofore he has been on the table  
on the table and you were looking  
ove down. Now then we turn our  
his side and try to get to him as  
as possible so that these shadows  
each other. For instance now we  
on the table on his side and it don't  
rence which side it is. Now we  
from above downward, passing  
structures of the skin, muscle and  
and take what we call a lateral pic-  
is. When I say a lateral picture I  
w. We have been looking at him  
ng the face and facing him back to

(Testimony of Dr. H. F. Carman  
you. Now then we turn him around  
shoot him through here. That is  
lateral view. Now we come to the  
passed through laterally. This is  
vertebra. This is the top,—refer  
hibit A. This is our sacrum; this  
our vertebra. Now I wish to call  
these [120] shadows of the vertebra  
rum. If you will notice referring  
A, this even curve from above down  
all see what I mean here looking  
away from that picture a moment  
sacrum is an even curve, referring  
These lines, transverse lines cross  
tion between this vertebra both down  
if you look again down to Exhibit  
I am pointing to is the shadow of  
I have marked on Exhibit J the  
with the letters J-1 and that point  
the front part, or anterior part of  
instead of this shadow coming down  
one of the sacrum I have just  
you notice that there is a bulging  
this wall. I have marked on Exhibit  
letters J-2 the point indicated as  
is a bulging or pushing forward of  
wall of the sacrum. Can you all see  
this from that point to this point is  
The distance is one-half inch. I have  
letter J-3 the upper point of the  
about. I have indicated upon the  
end of the point which I call the

r. H. F. Carman.)

it is from point J-3 to point J-4.  
distance between the point J-3 and

draw your attention to this other  
ch the break through, passing up-  
backward. I have indicated that  
tter J-5 and I have marked the up-  
condition testified to and designated  
the letters J-6. Pardon me, but that  
will do us no good and it would  
h. You can see these are broken  
to me that the sacrum has had a  
e with a hammer or anything that  
ll [121] like that (Illustrates by  
n the back part of his sacrum.

g my Exhibit A. If this man had  
ack striking his sacrum here on  
like a rock, it couldn't be a flat  
t was over the edge of something,  
asing the Exhibit A—this wall has  
ward. I have indicated the wall  
by the letters J-7, and that indi-  
part of the sacrum on the body of

please indicate upon Exhibit A the  
indicate upon the Exhibit J with

d be the same point that I have the

dicate it on Exhibit A, the bony

(Testimony of Dr. H. F. Carman.)

A. It would be this area here. a fracture through the upper part of the vertebrae 1 and 2 numbering the sacrum.

I have indicated on Exhibit J. I have just referred to as being the fracture designated it J-5 and 6. The length as indicated upon the shadowgram is more. It comes right through here. What I mean? Now that is all for

Now I will make these others here. I will show the same thing. I am using Exhibit I. I am drawing your attention to the fracture of the sacrum as in Exhibit J and the point upon Exhibit I to which I have referred by the letters I-1. I am pointing to the bulging forward part of the sacrum, also to the shadowgram to me that there has been a fracture of the first and second vertebrae of the sacrum indicated by the letters I-2 the shadowgram I which indicates to me the crack

Q. What length does Exhibit I show of the fracture indicated by the point I-1?

A. That is a fracture through the upper part of the vertebrae 1 and 2 numbered from above downward.

Now I am calling your attention to the fracture. The vertebrae 5 of the spine. I am bringing in a word you have not



Dr. H. F. Carman.)

is here. Do you see these fine  
have seen vertebrae that stick out  
in talking about Exhibit A, using  
the sacrum the spinous processes  
these just make a little bump, but  
in the region they are long. The medi-  
cal case is spinous process. I call  
the indefiniteness of these shadows  
of the vertebra. In other words  
what I depicts the same condition as

Will you please resume your stand.  
Could you tell us if you can, basing  
on your medical and surgical experi-  
ence in the handling of X-ray  
and your diagnosis and examination  
what in your opinion caused the  
which you have testified and which  
indicated by numbers upon plaintiff's  
inclusive?

Offering evidence of an injury to his  
back, what I am not saying.

A very hard blow; it is an unusual  
and very possible that it was such a  
blow resulted from a man having his  
back and stumbling, making an effort to  
pass a gate, turning and falling and  
his lower back near the sacrum from  
about a foot above the ground,—that man  
wounds. [123]

(Testimony of Dr. H. F. Carman.

Q. Now Doctor, have you told me how you have treated Mr. Pooler?

A. After the examination which was made several weeks, he has been coming up for a check-up and inspection about once a month for a period of about 2 years.

I think I first saw Mr. Pooler in October, 1933. The condition about which testified existed in his body at that time. The charge for X-ray pictures is \$65.00. In addition to the physical examination and the vaccination,—that includes the whole thing,—I don't know how many pictures I have taken, but several of them. I have several of them that I didn't bring and there is no charge has not been introduced. I have charged \$2.50 for office calls; my charge for the vaccination will be about the same. Those charges for the services rendered are reasonable charges for the services rendered. I cannot give you the full amount of charges going to the office.

Q. Now showing you plaintiff's shadowgraph trying to couch it in the language of the witnesses, as I understand it there is a crack indicated by your shadowgraph and a lateral deviation which crosses in a lateral deviation of Mr. Pooler?

A. Yes sir.

There is also a crack which runs across the sacrum of Mr. Pooler.

Dr. H. F. Carman.)

by my shadowgraphs and my examination of the cervical joints of Mr. Pooler; there is no affection in his neck, and there is some affection in his right shoulder and there is affection in his left arm, affection which causes swelling. This is a total disability [124] from the plaintiff's engaging in manual labor. In my opinion, on my examination of him and my shadowgraphs, I believe that total disability to be permanent.

I have now a bill for my services rendered to Mr. Pooler and it is marked plaintiff's identification. It is a statement of the services I rendered Mr. Pooler and it was rendered under my supervision from books and records and I believe it is true and correct.

We offer it in evidence.

No objection.

Admitted in evidence without objection.

Received in evidence marked plaintiff's identification as follows:

DEED: The charge I have made in this bill is reasonable for the services I rendered and it indicates.

(Testimony of Dr. H. F. Carman.)

Cross Examination

By MR. WALKER.

The WITNESS: The plaintiff in October, the 19th, I believe, was a little over 4 months after the t He came to me of his own vol know. He told me when he had told me that he had been under Gregg of the Murray Hospital, nature and kind of treatment that istered him there. I did not Gregg about his case, and did not about his theory of the case. That that he had had X-rays taken. I X-rays and did not attempt to taken immediately or shortly a sometimes would throw additional as far as diagnosing is concerned a They may and they may not give mation because of the fact taken the injury. It is not common pr other doctor to get your inform or might not be better information 4 or 5 months after. An X-ray after an accident sometimes will a not reveal more clearly the condit 4 or 5 months after. I would n work is difficult of interpretation X-ray shadows are always difficult Some are difficult of interpretat

Dr. H. F. Carman.)

depends upon the angle the X-ray

is true that a picture such as you examine, Exhibits J, D, E and F could be taken by another X-ray apparatus from a different angle and produce and show a different picture.

It might show a different picture at a different angle. Depending upon the angle at which you examine a body, one can show various different pictures.

How many examinations I made of the spine I never counted them. I just see how many I want to see them to satisfy myself. I know how many times I saw the patient. I saw him a week or ten days at the time of the examination, saw him often, and was examining. [126] The dates on the pictures and they extended over a number of months.

When you are X-raying a party you do not rely upon subjective symptoms.

When you examine a patient before you took the X-ray, you rely mostly upon subjective symptoms. When you examine a patient, what the patient told you?

What the patient told me and what you feel. You rely upon your own information, that is with

reference to the spinous process. The process is the process of the vertebra that extends outwards from the vertebra. A num-

(Testimony of Dr. H. F. Carman)  
 ber of the deformities or abnormal  
 body are found in the lumbar  
 vicinity of the sacroiliac, especial  
 as I told you. I have spoken  
 gland, the left side of the neck.  
 in which sometimes is found a  
 by goiter. We do not know the

Q. So that when you speak a  
 that you found in Mr. Pooler's  
 gland, you do not attribute the  
 injury in this case?

A. Well when a man has not  
 pain or enlargement of his gland  
 denly large and painful and st  
 can attribute the change in cond

I know from his history that h  
 condition prior to the accident,—  
 he told me. In other words I as  
 told me was correct as far as he

Q. And was there anything th  
 reference to the gland, except wha  
 which you could base a conclus

A. No, I couldn't say that th  
 injury. If I could diagnose th  
 at them, and because they were  
 due to injury,—you couldn't do

As a matter of fact the lead  
 profession are at sea as to the ca  
 thinking accident and injury ar



r. H. F. Carman.)

and some lack of iodine. The  
on says that there is no specific  
e know. The causes of injury and  
d food and so forth appear in dif-  
t is like cancer.

ime after you examined the patient  
the various symptoms and you  
aminations and tests,—will you tell  
ou made, for example as to his  
n part from his feet to his knee.  
d them physically, looked at them  
d measured them and tested their  
r pressure. For instance you put  
n on the leg with your finger with  
leg that is swollen, edema, where  
e, the blood vessels pits on presure.  
ut your thumb or finger down on  
ne degree of pressure and take it  
in the tissue,—that is edematous.

test?

f the limb which tells you if it is  
rged.

est the reflexes?

is tested neurologically; that is  
e nervous system.

ndings I tested the sensory ends,  
at is for feeling and touch, their  
d [128] cold, the re-action to pres-  
on of pain. I used the method of  
nd artery forceps and you see if  
ether you are touching with the

(Testimony of Dr. H. F. Carman. point of the pin. One is pain pressure. I gave this patient the

The usual diagnosis in my pro about sixty years of age for swol the plaintiff has,—or the usual tes thorough physical examination, test his heart, his lungs, his ne glandular system, all of them. I cause of swelling in a male of a most frequent is heart, especiall limbs because that is the furthes heart and it takes more force f pump the blood through and it sta tant arteries. A kidney infection a similar result, and very frequ think as frequently as the heart the causes. I spoke of incontine urine. A frequent cause of that the plaintiff's age is the prostate g his prostate gland but not with a the rectal method, palpating the finger. I did not use a catheter quently used. It is not unusual sixty years of age a condition of his urin because of the enlargeme gland. On the examination of the did not examine as to voiding and him as to voiding to find out how the bladder. That is a frequer where you suspect that the pros structing.

r. H. F. Carman.)

now whether or not the condition  
of the plaintiff in October, around  
1933, existed [129] immediately after  
the June of 1933?

What he was not troubled with his

at the swelling of the lower limbs?  
Were they swollen.

Do you think that they were swollen?

Yes, that on my examination.

Was it the accident?

Did you see him in June, right after the

October, after June, of the accident,  
swollen but he didn't put very much  
weight on that. He was not worried about that  
at that time. He was not worried about that  
condition. He did not think that was due to the fact  
of this condition some time; I don't  
know the significance of that condition.  
Did you tell me that he was worried about

reference to the condition in a male  
of 40 years of age, swelling of the limbs  
of the knee, that condition generally  
is a result of injury?

Generally it does not result of injury?  
No, often, because there are some con-  
ditions that are not injuries.

Does it happen that the condition of  
the feet to the knees is not the result

(Testimony of Dr. H. F. Carman of injury because there is some the same applies to the condition that it more frequently happens but from disease.

Q. From your examination through X-ray which is the only of determining about these spinous did you learn? [130]

A. There is very little disturbance in the process because we don't consider processes rudimentary, that is similar to the lumbar. The lumbar spinous are practically normal, except others draw their attention to, which is more serious, that are indefinite and look like they have been scrambled up and they are not well defined.

Q. Would you say as to what it would take to develop the condition from the shadowgraph, after any length of time?

A. Two or three months or longer. It would develop within that time. The condition I found in the sacrum would take longer to develop, four or five months. I did not set any particular date as to the time and repair processes work faster than they work slower, but there is nothing definite in the lumbar region of the spinous process of the lumbar region. I did find in the sacrum two or three, e

r. H. F. Carman.)

ird, fourth and fifth sacral verte-  
d. I did not find any paralysis;  
ysis . It is a bony injury with the  
ns, ligaments and connective tissue  
ones together.

hat is the cause of the absorption  
t this morning, of calcium, besides

disease; take your thyroid, para-  
lood diseases decreases the amount  
e body. This could take you into  
which is too deep likely, but a lot  
we don't realize and don't know  
ere are but few doctors that are  
ve access to the better method of  
eiums.

any blood test of the patient, that  
st. I made no blood test. I do  
unusual not to do so unless there is  
it.

ditions that you related this morn-  
structions on the X-ray pictures  
developed within ten days or two  
ury?

an the change in the bone?

is you mean the thinness or lack of  
forth.

would not occur.

inuous process?

(Testimony of Dr. H. F. Carman)

A. No, not a couple of weeks.

Q. It would take a greater length of time, ten days or two weeks or a month?

A. It would show up in a month. I would put your arm in a cast for two weeks and you would see a difference in it.

I would not say I found any atrophy except atrophy of non-use. I do not find atrophy at all only from non-use. It does not apply so much to his arms because he uses them a little more than his legs. The arms are better nourished. The difference between the two, the one is nothing to appeal to me as being better than a man who has been used to working and then quit working completely.

From the object in my hand, marked as the indication plaintiff's Exhibit L, I call your attention to the jury what I had reference [132] to the language spinous processes. The spinous processes in the lumbar region which are the processes of the vertebra stand out from this process that I have my finger on the spinous process straight back. The spinous processes in the lumbar region have no deformity in them. I had reference to, when this question was asked, the haziness of the articulation of the vertebra here which I have my finger upon the articular processes, which articulate the vertebra below. This is a much smaller



r. H. F. Carman.)

are the rudimentary processes of  
ess in the sacral region compared  
anent heavy processes in the lum-  
ese in the sacrum in this skeleton.  
he ones that articulate or join the  
these faces here, which are the  
r processes that unite with the in-  
f the vertebra above. Exhibit J dis-  
process. I cannot point out on  
fference that I would say did not  
e of the accident. This morning  
to the haziness of these articular  
not clear cut and well defined. I  
cause I do not know whether that  
at the time of the accident or not.  
e said about the spinal processes  
ue to the accident but I cannot say

know whether or not that same  
ferred to that may be due to the  
patent and apparent at the date

condition is the condition that you  
es, an exudate,—I mean nature  
id, a temporary callous; and in  
actured, long bones there is [133]  
the bone and that callous is soft  
iving you a straight, well defined  
ziness.

with reference to Exhibit J this  
arly referring to the spinal process

(Testimony of Dr. H. F. Carman) was not conjectural. It is a sim you find in healing injuries. I ca condition was not the same when it was right after the accident.

Q. Therefore I say that any t given with reference thereto is your surmise.

Mr. DAVIS: That is objected it is repetitious and argumentative.

The COURT: Sustained.

Q. Let me ask you this Doct positively under oath that the e referred to and known as the spin different when you took that pictu day of the accident?

A. I sent for this (Exhibit I it is not the spinal process; it process.

Q. Well in the articular proce there is any difference a day after there was at the time you took t

A. I can't say when that ha

Q. Well would you say that a mediately after the accident mi your conclusion?

A. It might.

Q. It would, would it not?

The COURT: If you have su it to him and he can answer.

Mr. WALKER: I don't know the opportunity to use it, but I

r. H. F. Carman.)

ounsel will [134] consent, to show  
taken by Dr. Gregg if it throws  
ctor said it would.

If Mr. Walker feels it is a proper  
he picture he is at liberty to offer  
going to waive any rights.

You may examine the Doctor as  
s. It appears to me it is an unfair  
ask a man if a picture taken immedi-  
cident, or right after the accident,  
condition that the picture in evi-  
s. It would be simply guesswork,  
at as well as I.

We make the objection that the  
relative.

It is merely asking him to specu-  
g that he knows nothing about.

Q: The question I put now is would  
n immediately after the accident,  
what the picture, their Exhibit J  
e light on the matter?

And he told you that it would. My  
t you produce the picture and pre-  
d see what information it does give.  
ven't got the picture.

R: No, I haven't but I will try to  
ning.

You will have to recall him as  
s.

C: May I have permission to recall

(Testimony of Dr. H. F. Carman)

Mr. DAVIS: Not for cross ex

Mr. WALKER: For one que

The COURT: Not for anything  
get the picture between now and  
ness closes.

Mr. WALKER: I cannot rig

The COURT: Well then cease  
something not in court and about  
nothing.

The WITNESS: Plaintiff's  
anterior picture of the iliac sac  
was not taken at any angle at all,  
towards the body; the body on  
directly over, the rays going  
Plaintiff's Exhibit C is an antero  
pelvis and lumbar spine. The po  
the right ilium. You are now lo  
The patient was not on his stom  
around and you are looking at  
the left.

Q. Now referring to these li  
the picture which you said were w  
connected up with the ilium and  
held the bones together, which on  
you say was the one that displa  
normality?

A. The left.

Q. This one here?

A. No that is the right. Can't  
is a wider line on this side than t

Q. I am trying to distinguish

er. H. F. Carman.)

; this is the sacroiliac joint on the

the difference between the right and  
ur right. There is a difference be-  
nd the right. On the side here it  
line, and here likewise a distinct  
ence between the left side and the  
y there is a crack that wide on the  
would say it is that wide on the  
as wide between the left side as on  
hat in fractions of an inch. You  
ractions on that. A picture of the  
case could be taken from a right  
tion and give an entirely different  
t aspect. In all X-ray work results  
e entirely to the angle at which the

words depending upon the angle  
take a picture you can make one  
picture and another situation in  
ame body?

ke him at different angles you have  
ons, just the same as if I would  
h of you face to face and then take  
you, I have aspects and they don't

width of the ligament or the abnor-  
y be displayed in a different way  
just from the angle at which it is

(Testimony of Dr. H. F. Carman)

A. Of course you are looking angle; it changes in every angle your body.

When the plaintiff visited me whether he told me that he had an accident in December, 1932; I don't know whether he said that he had an accident in which his car turned over or whether he had some ribs injured. It might be in assisting me diagnose his case.

Q. Particularly if it fractured

A. No, the ribs are not in question. I never complained of it.

He would have to complain about it. I would direct my attention to his ribs and whether any tenderness or pain that I had in his chest. I don't recall that he said that. [137]

Redirect Examination

By Mr. DAVIS.

The WITNESS: If you take a photograph of a man's face and that man has a bump on his nose, what angle you take it it is still the same angle from which you took it would be a different aspect of his nose. When I saw the plaintiff's Exhibit C, the plaintiff's photograph on his back, as near flat as I could get it. I could have the subject here, Mr. Pooler.



r. H. F. Carman.)

his body and in the examinations corroborating evidence of the things these shadowgraphs.

ject, nor did I have reason to suspect Pooler had an affected prostate and incontinence of urin and the genu- mination we make. It is generally the practice of medical men, not to treat the prostate, but to treat the pros- tate through the rectum with the fingers and treatment.

ies attribute goiter to trauma or sort. I would say it was rather

r Walker that the hazy condition in Exhibit C of the plaintiff in the X-rays of the lumbar and sacrum were that haziness follows an injury.

ferent opinions on the interpreta- tion of shadowgraphs. I have taken X-rays of the lumbar and it forms a definite part of my practice. I frequently take pictures upon my equip- ment. I am frequently consulted by physicians and I am frequently consulted by other physicians to assist in the diag- nosis and interpretation of shadowgraphs. [138]

in which I find in the articular changes in the lumbar and sacrum might develop in a period of three months. The changes in the bone are depictable in a period, or a period of two weeks. If you put an

(Testimony of Dr. H. F. Carman.)  
arm in a cast or bandage it up and  
would be depictable and it is det  
of the bone and that would be p  
X-ray. I found no evidence of at  
from non-use. That was particu  
legs.

When I spoke of the sensory  
senses, feeling and things of tha  
mine the sensory test of Mr. Pooler  
by tactile senses, that is what you  
touch you. For instance when I r  
that desk lightly I can by contact  
the roughness or smoothness of th  
contact. To find out if a man fe  
pin and I stick him with the point  
then turn it over and use the h  
can tell between pressure and the  
that is how you distinguish those  
If I want to know his deep sensa  
with my hand to see if he can de  
sation. If you want to detect the  
perature. you use two test tube  
hot water and the other with col  
lightly with the cold and then th  
he can detect heat from cold. Th  
the sensory tests.

Q. You told Mr. Walker that  
definitely or positively when that  
indicated in Exhibit C began in  
Pooler, but basing your answer o

Dr. H. F. Carman.)

of him and the pictures you have experience as a doctor and surgeon, union [139] did that haziness begin? me to an injury which really started g, or became pronounced two or month after the injury.

that were propounded to me by Mr. o with the average man. I told Mr. ed my conclusions in relation to use of my knowledge of his history tion and because of my own back- ing with cases of this sort. I saw approximately the 19th of October. in June.

That is all.

R: In view of Your Honor's sug- ask if they would waive the privi- ence to the pictures taken by Dr.

What privilege?

R: The privilege the plaintiff has hem to be used, privilege commu-

That is a matter we will take up of the jury. It is a suggestion that made in their presence at all. The to deny his physician the privilege stand as a matter of law and you the way you place the matter now, does not consent it may have an

(Testimony of Miss Irene Callahan)  
influence on the jury; it is improper to  
an impression that could not be  
We will pass the matter now.

Witness Excused. [

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MISS IRENE CALLAHAN

called as a witness on behalf of the  
duly sworn, testified as follows:

Direct Examination

By Mr. DAVIS.

The WITNESS: My name is Irene Callahan  
and I live at 2111 Grand Avenue  
Butte, all my life, born here. I am a nurse by  
profession and am a registered nurse. I have  
practiced my profession at the Deaconess  
James' Hospital and Murray Hospital  
for a period  
of 8 years.

In my practice in the months  
August, 1933, I met Mr. Fred Pooler  
man sitting there with you and  
him at the Murray Hospital as a  
first saw Mr. Pooler he was in bed  
I do not  
remember what month it was. As to  
duty would not remember exact  
hours, but I can remember him at  
hospital at the time I was working  
I do not  
say exactly how long he was there  
a month, and I think between six

Miss Irene Callahan.)

with Mr. Pooler while he was a nurse and I rendered services for him the usual hospital routine, bath- ing to turn him and rubbing him, and a nurse usually has to do for an while in bed. It was necessary for him because he complained of pain so severe that he could not turn his body and could not turn his whole body at the assistance of a nurse. I sometimes and I occasionally bathed him. He complained of pain. [141]

which was given him was bed rest, and they got a brace for him out of bed and gave him a wheel-chair or whether a crutch or a cane while but I know it was one as he went but I can't say positively that he walked on the hospital.

could feed himself and he could sit in bed and we would push him in to see why he was put in the wheel-chair to go to the bath room after he got out of bed. I think he was in bed before we left him up, but I couldn't say the time, but I know it was at least

statement on my nursing experience with people in the hospital generally. Knowledge of Mr. Pooler, he appeared

(Testimony of Miss Irene Callahan to be badly hurt, in fact at times and cry out with pain. I never saw Pooler before seeing him in the street, no interest at all in this case.

Witness Excused. [

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JAMES M. GILBERT

called as a witness on behalf of plaintiff, sworn, testified as follows:

Direct Examination

By Mr. DAVIS.

The WITNESS: My name is James M. Gilbert. I live at 1828 Sherman Street, Butte. I have lived there a little over nine years. I am married and have a wife and four children there with my family. I have lived in Butte a little over nine years and have lived in other places but one month at my home on Sherman Street.

I am a miner and at the present time am employed at the Belmont Mine; have worked at different mines in Butte, for nine years.

I know Fred Pooler, the gentleman who was with you, and have known him about nine years, probably a few months more, and know him quite well; have known him at my home. We live a little over a couple of blocks about one block between his house



James M. Gill.)

my house and I can see his house

20, 1933, Mr. Pooler worked as a  
Company mines of Butte, for a  
n I had an opportunity to observe  
l and carried on activities around  
to June 20, 1933, he was an able  
hed something around 180 or 190  
visited his home. When I visited  
ly went in through the back gate  
earer. I had an opportunity to  
nds of Mr. Pooler's home.

Summer of 1932, in the back yard  
43] lawn, garden and flowers,—a  
nd well kept. He had trees there  
flowers. He had a garage in 1932,  
burned down. I don't remember  
ed because I was out of town for  
the time.

to go in the back yard of Mr.  
the month of June, 1933, and had  
ard just a few days previous to  
fence which runs on the south  
er home and there is also a fence  
e west side of the Pooler home. A  
on the west side of the home and  
Pooler and it is possibly 4 feet  
his home and yard in the Spring  
iously I observed walks along that  
ere was an ash barrel or garbage

(Testimony of James M. Gill.)

barrel near the sidewalk north  
just north of the ash can were s  
or coils of wire. Defendant's Ex  
garbage can I just referred to.  
was right near the walk in the  
might be a foot or possibly 2 fe  
but it seems to me it was right n  
rolls or coils of wire were some  
feet north of the garbage can.

I had observed those coils or  
to June 20, 1933, nearly every tim  
you are coming out the back gate  
ally see them because they sat a  
and you would naturally see th  
them something like a dozen ti  
which I referred ran alongside th

I used to go over to visit Mr. J  
in a while to borrow the lawn m  
and things and to make neighbor

I had occasion to go to the ho  
in the late [144] afternoon of J  
was the evening Mr. Pooler got h  
attracted my attention. She live  
from me and I was working in  
car and she came out to get th  
paper boy and some children  
pointed to Mr. Pooler's place an  
saw Mr. Pooler laying outside t  
of his back and I ran over and  
flat on his back and some wire's

(James M. Gill.)

I said, "What is the matter Fred"  
t damn wire"; and then Mr. Lene-  
nd we carried him in the house.  
painter that lives the second door,  
Mr. Pooler. I saw Mr. Lenehan's  
before I got to Mr. Pooler's place  
han just came up the street previ-  
r. Pooler fell.

was around Mr. Pooler's feet came  
e. In fact when we carried him  
strung out through the gate where  
That wire ran back to where the  
ash can. The wire that was around  
that time was the wire that came  
e wire about which I testified. I

s not able to walk into his home.  
less from his hips down as far as  
se he rolled over onto one side on  
up and he couldn't and when we  
had no use whatever of his limbs.  
e to walk. We carried him. Mr.  
me carry him. His feet, as we  
were dragging. We carried him in  
bed and I remained there until  
I got a drink of water for Mr.  
him a smoke and tried to turn him  
ould rest comfortably in bed, and  
ried to move him he complained.  
ot able to put him in a comfortable

(Testimony of James M. Gill.)  
position. He could drink the wa  
him up, every time I raised hi  
drink. He was complaining and  
down. He did drink but spilled  
raise him high enough. He said

I saw him again early next m  
went to his home. He was in b  
later on helped him as he left the  
him in the stretcher and carried  
in the abulance. He was not ab  
time. That was early in the aft  
day. Jim White helped me put  
lance. I don't know who the driv

When we put Mr. Pooler in b  
dent he complained of his back  
in his legs and feet. He said th  
in his legs and feet. They were c

He was not lying prone on t  
saw him. He was trying to get  
to roll over. From his conditio  
be badly hurt.

At the time he was working a  
was absolutely an *able-body* man  
see. He weighed somewhere aro

I saw him when he came from  
was then helpless. I don't know  
then but I don't think he weigh  
walked on crutches when he re  
been on crutches or a cane mos

James M. Gill.)

ask there was a long time that he  
S.

city when the wires were burned  
back in town a short time when  
did not see anyone remove those  
remises of Mr. Pooler. [146]

Cross Examination.

S: I live at 1828 Sherman Street.  
runs east and west and west of Mr.  
on Sherman Street my house faces  
back yard I could look across to  
as there was a vacant lot between.  
Mr. Pooler testify,—he testified  
rubbish thrown around through those  
that neighborhood and that is the  
want the wire that is referred to

the rubbish was south and east of  
ee.

very little between my place and Mr.  
There is a drain through there, kind  
ugh there; a very little gully and  
n in there. There might be a few  
that the wind blows in once in a

Mr. Pooler rather intimately for  
rior to 1933, and saw him working  
e. Up to the time of his accident

(Testimony of James M. Gill.)  
he was perfectly alright as far as  
an able man. I would see him  
not to talk to him, however, but  
week anyway spoke to him and that  
did not continue through all the  
20, 1933, because I was out of  
months during that year; was out  
part of the Winter, but would  
maybe once a month during that  
there during the early part of  
then. He was perfectly alright  
I visited him once a week or more  
at that time.

I did hear of him being in a  
dent. While his [147] car was  
walking down to Harrison, seven  
the accident. He had an accident  
was injured or not, I don't know  
examined him. I saw him walking  
I was not aware that he had some

I heard of his garage burning  
while I was away in the Fall and  
The remains of the burned garage  
after I got back in the Winter of  
fore I came back they built another  
started to build it. I was in town  
prior to June 20th. In the Winter  
back about every month, some  
month but I came back in town  
believe, in April, 1933. The do



James M. Gill.)  
going in Mr. Pooler's yard and seeing  
after April, after I came back to  
between April, and the 20th of  
the accident. I saw the wire there  
there were three rolls of it; and  
t. I wouldn't say they were reels  
just wire that was coiled up and  
wire around it. I never paid any  
on to it but just as I would go  
uld see it sitting against the fence  
nt have been three or four feet  
an, something like that; it seemed  
nt near. They were something like  
ere to the chair beyond the ash  
ne there was one coil laying there  
against that and a third coil  
two. They were one on top of  
was leaning against the first one,  
rn so that you could tell that there  
a third one; below that the third  
was a smaller one of the three,  
uch wire in it as there was in the  
It was just wire. There was some  
ad burned insulation on it, but  
I never paid attention to it. It  
d burned insulation, I don't know  
aid any particular attention to it;  
here and it was wire. There was

(Testimony of James M. Gill.)  
burned insulation hanging on so  
paid attention to know whether  
twisted wire. I never went over  
wire off the walk.

I got there shortly after Mr.  
and in time to see the wire twist  
entangled in his feet. I did not  
wire, I just pulled it off his feet  
inside the fence. I had a hold  
didn't notice whether it was sin  
or whether it was insulated or  
and I don't know. I threw it ba  
off the walk and did that just b  
Pooler in. I didn't go through  
just reached back in the gate an  
walk. I saw that wire again tha  
after having my supper, or when  
to supper rather, I saw it. I do  
only it was wire. Don't recall wh  
wire, twisted wire or single wire  
close attention to it that night  
threw back in the yard ran back  
where the rolls were, in the dire  
of wire were, because the wire  
the two big rolls out around the  
sure of that. I couldn't say wh  
it was the bigger coil or the sma

Witness Excused.

CTOR MEHRING

ess on behalf of plaintiff, being  
ied as follows:

irect Examination.

Q: My name is Victor Mehring  
9 Garfield. I have lived in Butte  
nd am a married man and have a  
aintained with Mr. Fred Pooler just

I have known him for about six  
er than knowing him to speak to  
ne same neighborhood, just about

I know nothing about Mr. Pooler  
d sent to the hospital and I did  
nt.

of the Pooler home is visible from  
see all of the back yard of the  
n my home, that is the back fence  
the building. I do not remember  
s or coils of wire in the back yard  
home.

member, sometime after June 20,  
one enter the yard of Mr. Fred  
e therefrom some coils of wire?

Objected to as incompetent, irrele-  
rial, having happened after the  
ent.

Overruled.

Exception.

(Testimony of Victor Mehring.)

A. Yes, I seen some one take

The wire which I saw some one  
Pooler's yard was rolled up. I o  
many rolls there were but I kno  
a bit of wire. I saw someone e  
take it. I don't believe I could  
son. [150] I was sitting out o  
when I saw the person take tha  
accompanied by my wife upon the  
own home. I was attracted to it  
phone Company's truck stop at  
The Telephone Company truck s  
Street and the alley. There was  
between where the truck stopped  
place. The telephone truck stop  
Street and the alley. I knew it  
truck because it had the emblem  
the door of the truck and it said  
the bell and there was a circle an  
the insignia of the Telephone C  
man enter the Pooler yard and  
put it in the truck and he then  
was after June 20, 1933.

Cross Examinati

By Mr. GUNN:

The WITNESS: I live at  
that would be about northwest o  
Pooler's place is out that way fro  
not read maps and it would not  
step over near the map. From

(ctor Mehring.)

here in this direction, northwest  
home faces east. I couldn't say  
in the corner of the Pooler garage  
it would be pretty hard for me to  
see, but you know how far it is  
and that is an alley and catacorner,  
about the center of the block.

north of the Pooler home would  
and that runs east and west. I  
of George Street and I live about  
in the middle of [151] the block  
give you any estimate of the dis-

rive up to the Pooler house but I  
what date it was and it would be  
say because I don't remember. I  
ou a definite answer about what  
was late in the afternoon but I  
any specified time.  
rser to 3:00 o'clock or closer to

Just a moment now: this has gone  
old you he couldn't tell.

S: It was late in the afternoon.  
You asked for different times and  
ouldn't fix the hour,—late in the  
e of wasting the court's time or  
non-essential.

This is cross-examination.

Well we cannot have a question  
r four times. He told you he

(Testimony of Victor Mehring.)  
couldn't give the hour. Proceed.  
The question is, did the Company

Mr. GUNN: I would like an  
remarks of the court.

The COURT: You are entitled  
Proceed.

The WITNESS: My wife was  
porch with me. I couldn't answer  
either. I know it was shortly after  
hurt, when I heard he was hurt  
drive up and stop on the corner  
and the alley. Marcia Street and  
the west side of the Pooler place  
the southwest corner of the Pooler

It was a light truck. It would  
the color it was painted in a dis-  
say it was a sort of green, [152]  
won't say it was a bright green.  
on that truck and it was on the  
it was a bell where I was sitting  
field Street. I saw the man get  
and went into the Pooler yard and  
some wire. I didn't say they were  
I said it was rolled up and I could  
it was one or a dozen. He put it  
drove out west toward town. I  
truck because I was not interested  
down the street as far as I know  
Street.

Witness Excused.



MABEL MEHRING

on behalf of plaintiff, being duly sworn, deposes and says as follows:

Direct Examination.

Q: My name is Mrs. Mabel Mehring, 1809 Garfield Avenue, and am the wife of Mabel Mehring, who just testified. I have lived at my present residence for 10 years.

Q: Mr. Pooler to see him like anyone else in your neighborhood. I have only been in his neighborhood for a few days.

Q: All being on your porch one afternoon, your husband and seeing some one enter your house.

Q: When you were sitting on the porch but I didn't see him. I saw him come out.

Q: He took it from his hand and he took it and put it in the truck and put it in the truck. It was just a light truck and I know it was a light truck because it had a sign of a light truck around it. That was visible to me while I was sitting. It was in the afternoon. I was sitting on the porch and my husband accompanied me. My husband is a miner and stationer.

Q: When he placed the wire on the truck he saw it. The truck stopped in Pooler's alley on the back of the street. That alley is situated between the Pooler house. I live across the street from the Pooler place but I couldn't estimate the distance.

(Testimony of Mrs. Mabel Meh  
the feet. The Pooler house is pl  
The car was parked in the alley  
no interest in this case and I do  
about the accident. [154]

Cross Examination

By Mr. GUNN.

The WITNESS: I heard my h  
and the cross examination and I  
with what he testified to.

Witness Excused.

---

MRS. NELLIE ERN

called as a witness on behalf of p  
sworn, testified as follows:

Direct Examination

By Mr. DAVIS.

The WITNESS: My name is  
feldt and I live at 1901 Garfield  
there four years. I am acquainted  
I am married and have a family  
at this location with my family f  
known Mr. Pooler about three  
and have had occasion to call at  
and Mrs. Pooler. I used to go  
the telephone and went quite of  
had occasion to call upon the Po  
went there in the early Spring of

rs. Nellie Ernfeldt.)  
men was Mrs. Pooler was sick and  
en to see how she was.

corner of Garfield and Marcia, and  
within a block, on the corner of  
ia, catacornered. I can see the  
om where I live and it is quite  
When I went into the Pooler home  
ays went in the back gate because  
I had a chance to observe the  
he Pooler home. The grounds are  
have pretty flowers and trees and  
bles and things like that. They  
e place out of it. When I went  
ard of the Pooler home I went  
and went through the gate. The  
n the southwest corner and it is  
ree feet or maybe three and a half  
ough for a fat man to get through.  
was a walk near that gate and it  
loor. The walk is about two and  
aybe two feet wide and made out  
56] I walked over that walk many  
ent or concrete walk at the end as  
is within three or four inches of  
the rest would project above the

on of June 20, 1933, I was standing  
getting the paper from the paper  
know it was June 20, but I just  
day he got hurt. When I was  
I was looking up that way and I

(Testimony of Mrs. Nellie Ernfe noticed Mr. Pooler came out with and came out the back door and and as he got within three or four he began to stumble and I seen he began to try to get to the gate himself and as he did the gate came out and he fell and hit the ground came open. I looked across and Gill in the yard and I hollered a ward Pooler's and they looked the went as quick as I could get the When I stood in the yard I d Pooler doing anything other than self; I don't think I did.

I saw Mr. Lenahan going by Mr time in an automobile and he stop the house. I cannot say that I n any sort of recognition of any so gave to Mr. Lenahan. When I Mr. Pooler was I found Mr. Len Mr. Pooler and Mrs. Gill joined wards and also Mrs. Lenahan.

Mr. Pooler was lying right out on the ground and he couldn't g about two attempts to get up and because he was all tangled with th was around his feet, kind of aro looked to be quite a bit of it. heard Mr. Pooler make any [157 He was groaning when I got th

rs. Nellie Ernfeldt.)  
and Mr. Gill took Mr. Pooler by  
ok him in the house. Mr. Pooler  
walk. His feet were dragging.  
had an opportunity to observe Mr.  
his accident?

the two evenings before.  
to observe the back yard of the  
and I noticed the wire that stood  
fence of the Pooler home and the  
rbage can showing in Defendant's  
e ash can that I refer to. That  
d within a foot or a foot and a  
two feet north of the cement walk  
w it two days before. The coils  
a I referred were about six feet

icket fence on the south side of  
and you are able to see plainly  
et fence what goes on in the Pooler  
hat picket fence would be some-  
or four and a half feet high. I  
fence would come up to about your  
ould not come up to your shoulder.  
strike about your coat pocket.

wire was just wire that was wound  
ou wind it up and it was tied with  
wire. As I went out of the yard  
s before I think there were three  
e. When I saw the wire that was  
f Mr. Pooler it was the same wire  
e the fence. I could tell that be-

(Testimony of Mrs. Nellie Ernfe  
cause I helped to pull it back and  
the other wire was.

Before the accident I had seen  
Pooler walk and [158] saw him walk.  
He could do most any kind of work.  
He was a blacksmith. I saw him walk  
from the hospital and he did not  
appearance then he had before he  
hospital. He was then quite a bit  
nervous and he could hardly walk  
crutches. Mr. Pooler's appearance  
with his appearance prior to the  
much thinner, much weaker and  
looking.

Mr. Pooler came to my home  
after he returned from the hospital.  
I know Mr. Pooler was home. I  
morning and I heard someone  
front and I looked out and I  
Pooler". He was very weak and  
up on the porch and my husband  
and took a chair out to him and  
rocker on the lawn and after we  
my husband said, "Can we make  
and he said, "Yes he would be glad  
so he drank that and sat there  
seemed to feel he was able to get a

I called on Mr. Pooler at the  
couldn't say how long he was in  
it was quite a while. When I saw  
hospital he was in bed.



(Mrs. Nellie Ernfeldt.)  
parance of Mr. Pooler as he lay on  
as he made an effort to get to his  
was carried by these two men into  
med to be badly hurt. I cannot  
ny interest in this case, any more  
man is hurt and that is the only

ross Examination.

S: I live at 1901 Garfield Street.  
159] street west of Banks. I live  
Marcia and Garfield.

s I saw this wire before the acci-  
e I helped pull it away from Mr.  
the night of the accident, I could  
her it was a single wire or double  
It just looked like wire that was  
nsulated wire. I saw Mr. Pooler  
house that night just before the  
n the court room when Mr. Pooler  
ecall his testimony about sleeping  
of June 20th, and getting up and  
e pan of ashes. I saw him come  
and go towards the alley but I  
as going so fast; he was walking in  
I just noticed him come out of  
ne ash pan and walk along and I  
be began to stumble. As far as I  
ust walking along as he ordinarily

ness Excused. [160]

MRS. GRACE G

called as a witness on behalf of p  
sworn, testified as follows:

Direct Examinati

By Mr. DAVIS.

The WITNESS: My name is  
and I am the wife of the gentle  
earlier today. My husband and fa  
at 1828 German Avenue, and we  
nine years last August.

I know Mr. Pooler and I know  
know where his home is located,  
Banks and Marcia, but I don't  
I have had occasion to visit in  
Mrs. Pooler and I belong to the  
and then Mrs. Pooler was sick a  
at the door and inquire how she  
to a neighbor. I know Mr. Fred  
and have seen him often. I re  
to June 20, 1933, and years prior  
smith and a very active man.  
walking by my house several ti  
very sprightly and he used to ca  
handle and swing it around a  
Pooler", one day in the Summe  
carry that cane; I think it is a  
use it" and he said, "There is ba  
and I use it to protect myself."

The Pooler home is visible from  
I visited the Pooler home I usua

rs. Grace Gill.)

cause the family would usually be  
When I went through the gate I  
what was inside the fence. The  
yard was just like a park, beauti-  
vers and a fountain, and the back  
and shrubbery and plants [161]  
en and then along the back fence  
d some bushes and gooseberry  
eve an apple tree. The sidewalk  
k end of his house, from the back  
gate. The gate was on the south-  
e lot. The walk came to the gate  
against the end of the walk, and  
e that I used as I came into the  
ways walked on this walk that I  
ought it was a cement sidewalk,  
rd in court that it was made from  
rom the mine, but as I remember  
re or less than the ordinary cement  
uld say that walk was flush with  
e of the fence and dropped about  
the sidewalk would come like that  
uld come right up against it.  
to go in through the gate and yard  
of the Spring 1933, quite often,  
at fence, the west fence, I saw  
as been referred to, the garbage  
d everything along the west fence.  
I suggest, Mr. Davis, you have  
question far enough. Five or six  
old us all about it.

(Testimony of Mrs. Grace Gill.)

The WITNESS: I got to the dent on June 20, 1933, after M did not see him fall. I was so notice any thing about his feet a what made him fall. I saw Mr accident. He was lying on the g there and Mr. Lenahan and Mr to get him up. They carried him did not see him later in the hou did the next morning. I didn't ma anything for him that night. ' son-in-law but the next morning and tried to help, tried to give him and tried to raise him up so he c I couldn't raise him at all and ev him he groaned and screamed i tioned the pain. I said, "Cannot and he said, "You will have to g terrible." I was able to lift his put my arm under his shoulder a ficiently to drink the coffee but I thing for him.

I have seen him on crutches. I pital a month or so. I did not ma of his feet or legs while he was in but I remember at the time M tioned that his feet were numb, they were cold; she said "they fe trying to give him coffee and ma time that she was doing that.

(Mrs. Grace Gill.)

how many coils of wire I saw. It  
g the fence close to the garbage  
e ground against the fence.

I think you have gone far enough

ross Examination.

S: I was there at the time my  
. Lenahan picked Mr. Pooler up.  
s testimony here about untangling  
e. Pooler. I saw it the next morn-  
see my husband take the wire, he  
ack previous to my coming there.  
g Mr. Pooler mentioned he lost his  
ent to look for them but [163]  
m. I don't remember seeing the  
Mr. Gill evidently had thrown it  
e the trucks of the Telephone Com-  
of town at the time.

itness Excused. [164]

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FRANCES POOLER

on behalf of plaintiff, being duly  
s follows:

irect Examination.

S: My name is Mrs. Frances Pooler  
fe of Fred Pooler. We have been

(Testimony of Mrs. Frances Pooler) married 18 years. We live at 182 and have lived there ever since we

Before Mr. Pooler was injured a blacksmith. Prior to the accident unusually active and very strong and afterwards and now helpless. It has reflected itself in his would hardly know him.

I remember the incident of our instrument being taken out. That was in of 1933. I remember the incident say that I could identify that man take notice of him. I saw him yard. I was taking my usual morning just came around the north corner when the man entered the back "Good morning" and I returned he said, "I am from the Telephone after the telephone instrument there I said, "Very well, go right in; there," and at that it flashed into the wire that had been left there garage burned and I said to him would you take that wire with you will do that". He did not take it.

I objected to the wire being in the first [165] place it was not on my property, and in the next was located just where anyone could they came into my dining room; in to go into my dining room and



rs. Frances Pooler.)

seeing the disfiguring wire; and I  
lful plants there which I cherish  
t it there; it was a blemish.

ross Examination.

S: When I asked this young man  
me out if he would take the wire  
o that". At that time he did not  
er when I was talking to him; he  
. There was no hard feelings.

ness Excused. [166]

---

RS. GRACE GILL

er cross examination by Mr. Gunn,  
S:

S: At the time that I helped Mr.  
eet and took the wire from his feet  
tside of the gate; his whole body  
e gate and the wire was entangled  
outside the gate. Maybe there was  
ybe ten feet of wire there. As I  
it was a loop of wire that had got  
nd as he fell through the gate or  
fter he fell it dragged that wire

I would estimate six to ten feet.

irect Examination.

S: The wire came out through the

## MRS. BERNICE AND

called as a witness on behalf of p  
sworn, testified as follows:

## Direct Examination

By Mr. DAVIS.

The WITNESS: My name is  
derson and I live at 1846 Porter  
Fred Pooler and have known  
remember when he was injured  
and it was in the latter part of  
about it was when he was taken t  
I went to the hospital to see him  
the hospital he was confined to  
to the hospital four times and t  
his home. He asked me to come  
them at their home and I did t  
helped around, did the heavy wo  
He couldn't get the meals or swee  
that.

He was not confined to his b  
from the hospital all the time, b  
was on crutches all the time. W  
there he was badly crippled and  
to get out of a chair.

I had known him prior to the  
seen him in the Spring of 1933, s  
every day. I know he slept in a  
after he was home. Prior to h  
an able bodied man and he was  
living.

Witness Excused.

BERT MALLOY

on behalf of plaintiff, being duly  
s follows:

Direct Examination.

S: My name is Bert Malloy and  
wards. I am 61 years old and work  
living. At the present time I am  
Phillipsburg, and I have not got a  
working in a raise. I have been a

Pooler but I don't know him so well;  
but 6 or 7 years just by sight. I  
intimate friendship with him. I  
at a time after the garage had  
ere cleaning up and cutting away  
cleaning out where the garage had  
n. By we I mean Mr. Hemenlay  
ver Hemenlay. I went over to  
nd he said he was going over to  
aid I would walk over with him  
to the Pooler house. While I was  
nce I saw a man coming to the  
er property. That man was just  
g man's clothing, just the ordinary  
I didn't notice whether he had a  
e coat. I noticed that he was a  
man or something and I could tell  
was roling up wire and setting  
w him cutting wire off the post  
house and I saw him climbing

(Testimony of Bert Malloy.)

the posts and to do that he used  
ers. I saw them on his legs.  
them. That man was tearing the  
ting it over the fence and he and  
an argument about the wire. Mr.  
if he was going to leave [169] th  
he said "yes", he couldn't take  
there would be a truck down a  
later. I don't know that I heard  
believe Mr. Pooler said that he  
wire there and the man said, "W  
to worry about the wire" that  
truck down after it.

Later on I happened to be at t  
when a gentleman called to take  
I again went down that day wi  
just walked down there with hi  
out of work at the time. When  
were in the dining room of the  
didn't see the man who came but  
tion between him and Mr. Pooler.  
to take the telephone instrume  
Pooler said, "Alright there she i  
also said, "While you are taking  
would take that wire with you."  
said, "Well I can't take the wir  
with snow or partly covered up  
ain't got no shovel" and Mr. Po  
you a shovel" and he went ou  
whether he really got a shovel  
gone a while and come back an

(t Malloy.)

wire anyhow and he went away.  
t all I know about it. I didn't

if the wire had been taken when  
e wire was still there. I person-  
who placed the wire inside of  
first day I testified about and  
I was helping clean up the debris  
r the car or automobile that that  
first day. It was a coupe, if I  
small car, single seated. I did  
gnia on it. I could not give you  
ate that I was over there helping  
the fire but it was in the latter  
it was somewhere around Hal-  
long after, three or four days, I  
ge burning down. We were there  
after it burned, three or four  
give you the exact date that this  
t the house for the telephone in-  
as ten or twelve days afterwards.

ross Examination.

: I don't know as I ever noticed  
ecture that was in Mr. Pooler's  
down before it burned down; I  
the place much. The day I was  
Pooler and Mr. Hemenlay pick

(Testimony of Bert Malloy.)

up the refuse from the burned garage after Hallowe'en in 1932, about the

I was not working during the month of October and November, 1932. I couldn't remember the day it was I was there and saw the refuse got up late that morning and I saw it scattered around, maybe 2:00 o'clock, or 1:00 o'clock, where around there.

Referring to this map or sketch exhibit 1, and where you are pointing to the line indicates the Pooler garage; and where you run your finger along indicates the walk and the Pooler garage to the wall. Where you hold your finger indicates Pooler's west fence. I don't remember that west fence had been destroyed at the time I was there; there was a fence I couldn't say how much though; probably 10 feet or something like [171] that was there. The whole building was pretty well destroyed. The refuse from the fire was not scattered. As we picked it up we were picking up the piles and breaking it up, that was the boards and timber or whatever was there between the walk there. We were standing right in here somewhere at the place that we have now marked with an X and I couldn't tell you whether there was a fence or not. There was a little snow



Malloy.)

Some refuse over in here where I  
ger and at the point you have  
K and the letter N. I believe we  
boards of the burned part of the  
boards we just left there for the  
stuff that we picked up that was  
ve piled around there in different  
yard and put them on the west  
in there on the part between the  
and the garage on the north and  
on the east and the cement walk

er had this conversation with the  
wire I was on the other side of  
ust a little ways; I was between  
leading from the garage to the  
and the driveway, a short dis-  
Pooler garage and in there where  
nger somewhere and where you  
it with an X and the letter O.

out the wire in the yard. He just

He did not come in the yard;  
and lifted it over the fence, set it  
saw the wire after he had put it  
mine the wire; didn't examine  
ell what kind of wire it was. [172]  
ime in the Spring of 1933, I was  
ne again with Mr. Hemenlay sit-  
room when a man came and took  
. I didn't see that man. Mr.

(Testimony of Bert Malloy.)

Hemenlay, Mr. Pooler and I went to see Mrs. Hemenlay. I overheard a conversation about a shovel. I believe Mrs. Pooler was there at the time; she went out before the man who came to take out the telephone came; she was with the telephone.

It was in March, that I went to work on a Government job, I guess, but I can't remember the name and other people in Butte, we were working. Pooler was not working with me at that time. I was not working on the same job as the man I have reference to. I don't remember the number of days a week I worked. When we went to work on that job we went to work early in the morning, about 7:00 o'clock, I guess, and worked until about 1:00 o'clock, I guess, and then we would get home about 1:00 o'clock.

Q. So that you were not working on that job in the afternoon?

A. Now I don't know whether it was in January or February.

I don't know what day or what month it was when we went to work for the Government. On that day I didn't do any other work in the afternoon.

Redirect Examination

By Mr. DAVIS.

The WITNESS: When we went to work on that Government work we had our afternoon shift. We worked two shifts; we worked every day, about 5 hours after we went to work.

t Malloy.)

st what time it was this telephone  
e telephone, couldn't say what  
ruary or March. [173] I think it  
part of the year 1933. I have no  
n this case.

ross Examination.

: The man came to take the tele-  
vening after 12:00 o'clock; some-  
oon. I couldn't say now whether  
r 12:00 or near 6:00 o'clock.

irect Examination.

: Southern people refer to what  
oon, after 12:00 o'clock, as eve-  
'clock is evening to a Southerner.

ness Excused. [174]

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VER HEMENLAY

on behalf of the plaintiff, being  
d as follows:

irect Examination.

: My name is Grover Hemenlay  
Ottawa. I am married and I live

(Testimony of Grover Hemenlay with my family. I have lived in pretty close to all my life. I am Pooler, he is my step-father and his home. I had occasion to visit after the fire out there, when the garage; I think I was there the fire and I went there with Mr. both out of work at the time door to me and I was going wanted some place to go and he After he got over there he was remains of what was left of the was, and we gave him a hand raked the debris up on one side was there. Mr. Pooler and Mr. do that. I saw a gentleman the nection with telephone lines and the poles and cut the wires and The wires had been burned by t were hanging off of each pole. up and tied them and set them inside of Pooler's fence. I made him doing that. When he got to his car and got ready to leave and he was leaving the wire there I walked over to him, or walked told him he wanted him to take By the time Mr. Pooler got over hear what was said. At times I if not paying strict [175] attent

over Hemenlay.)

is pretty fair. I heard Mr. Pooler  
nt about which I just stated and  
man handling the wire. The man  
l to Mr. Pooler just a short time,  
nd said something; I don't know  
s fellow was dressed in working-  
I couldn't say what they were;  
ether he had a heavy large coat  
he climbed the post he had on  
climbers on. The car he got into  
didn't pay any attention to any  
ould say it was 3 or 4 days after  
occurrence took place where Mr.  
ooler and I cleaned up the debris  
versation took place about which

to be at the home of Mr. Pooler  
ne called for the telephone instru-  
sitting in the dining room Mr.  
Malloy and I. We had been in  
and somebody rapped at the back  
oler answered the door and this  
or the telephone, he said he was  
ne. I guess he disconnected the  
see him; we were in the dining  
told him he wanted him to take  
e was taking the phone. The man  
d up in snow and he didn't have  
ler said he would get him a shovel  
rent out to the yard and then re-

(Testimony of Grover Hemenlay turned to the house. I did not s to Mr. Pooler but I was within and could hear plainly what was man and Mr. Pooler. [176]

Cross Examination

By Mr. GUNN.

The WITNESS: I was th with the ground there in the Fa Spring of 1933.

I am referring to defendant's and to the plot bordered by th north, the fence on the east, and running from the front gate arc of the house and connecting with a north western direction to the the plot inclosed by this line. At grass, shrubbery and some trees the plot of ground bordered on garage and on the west by the b south by the concrete walk and t running to the garage, there w that plot at that time.

As we cleaned up the refuse that day we bunched it with south of this driveway and som here. When I say a little sou that would be in the vicinity w is and there was also a patch and the garden that was bare



over Hemenlay.)

ere. In October, aside from the  
ere, that whole plot west of the  
ding from the garage was prac-

was burned for the length of the  
ay 4 or 5 feet to the south, partly  
se that we picked up that was not  
urned in the furnace. There was  
ing; all it was good for was fuel.  
broke up and burned in the fur-  
ils and iron and metal that came  
would not be good for fire and  
o south of the driveway and [177]

or 3 days helping my step-father  
e and then I helped build a new  
this man was there I think was  
ere cleaning up the refuse of the  
leaning up that day.

he wire in the yard. I didn't ex-  
t was rolls of wire is all I know;  
attention to it or examine it.

hat time it was the man came and  
ut; it might have been in Febru-  
e Winter; I didn't pay any atten-  
of year it was. I helped to build

that constructed of?

We object to that as incompetent,  
material.

(Testimony of Grover Hemenlay)

The COURT: Sustained.

Mr. GUNN: May it please the court to reframe my question.

The COURT: The situation is that certain issues framed by the pleadings involve the construction of a new fence. Confine yourself to the issues here.

Mr. GUNN: As I understand the issues—

The COURT: We won't argue. We will confine yourself to the question of whether the defendant did or did not dig in the yard; if he did, was it done by whether Mr. Pooler was tripped or whether he was hurt and if so how. Let us get down to the facts of this case and stop arguing around. Just confine yourself to the case.

Mr. GUNN: We ask an exception. We like to make an offer to prove. [

The COURT: Make it orally.

Mr. GUNN: We offer to prove that Mr. Pooler, the plaintiff, was working with him in building the new gate about the point where the wire fence was in the yard for a considerable length of time in the Winter of 1932, and 1933.

The COURT: I will not allow that line in view of the fact Pooler was the wire put in there and knew it was

over Hemenlay.)

to the issues. He testified he  
there, he knew it was there. The  
our company put it there. If it

We ask an exception to the ruling

You have an exception.

Direct Examination.

S: I know that Fred Pooler had  
wood in his yard in the Winter and  
1932, and 1933. The sawing of that  
by some of his neighbors,—I don't  
know where, but I split a big part of it  
and attended the furnace and stuff  
was after the injury. I guess he  
was there before he was injured. I don't

Business Excused. [179]

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ALEX REMNEAS

on behalf of plaintiff, being duly  
sworn, follows:

Direct Examination.

S: My name is Alex Remneas,  
Manager of the Mountain States

(Testimony of Alex Remneas.)  
 Telephone and Telegraph Company  
 that position practically 9 years  
 manager in June of 1933. I had  
 man by the name of James Du  
 how long he has been employed  
 he has been here as long as I  
 my company is The Mountain State  
 Telegraph Company.

Witness Excuse

---

Mr. DAVIS: The plaintiff re

---

Mr. WALKER: At this part  
 to renew my motion for an order  
 to elect: Comes now the above  
 and moves the court for an o  
 plaintiff to elect between the tw  
 stated in the complaint herein  
 based upon the ground that the t  
 are inconsistent and repugnant  
 that this defendant is entitled to  
 of said two inconsistent causes o  
 required to proceed.

The COURT: It appears  
 causes of action joined in the cor  
 are based upon injuries to the p  
 tiff here. In other words both  
 stated in the complaint relate  
 acts [180] specified in the statu

that each cause of action affects the action, and they don't require trial. And further that they are numbered. So it would appear in the pleading that the plaintiff has stated and expressed the right the statute pleads in this case.

of action appears to be based on negligence alone. Negligence is defined in Section 2 of Section 10,713 of the Montana, 1921, as follows: "The words 'Negligently' import a want of care of the nature or probable consequences of the act or omission as a prudent man would bestow when acting in his own interest, the result that all that the plaintiff has to prove to sustain his first cause of action against the defendant was guilty of want of care of the nature or probable consequences of cutting the wire in the Pooler yard, if he were as a prudent man ordinarily acting in his own concerns.

and cause of action we have a different statement of a separate and distinct action, requiring different pleadings and proofs; a cause proceeding apparently under Section 8666 of the Revised Codes of Montana which provides that in any action for breach of an obligation not arising from contract the defendant has been guilty of negligence, or malice, actual or presumed,

the jury, in addition to the act, to give damages for the sake of example of punishing the defendant.

This statute is not intended for the benefit of the individual but it has that purpose, evidenced by [181] the statute which provides that the jury may give damages for the sake of example by way of punishing the defendant. In other words the jury is to consider whether under the circumstances warranted in punishing the defendant for an act oppressively and maliciously for the sake of punishing to deter others from committing the same.

The Code of Montana defines "Maliciously" as follows, Sub-division 1. The word "Wilfully" when applied to an act, with which an act is done or omitted, imports a purpose or willingness to commit the act or the omission referred to. The words "Maliciously" import a wish to injure another person, or an intention to do an act, established either by proof or presumption of law.

It will be noted that the first cause of action is merely based on negligence, failure to exercise ordinary care that a prudent man would exercise under the circumstances of the case. The second cause has alleged a malice against the defendant.

In order that the plaintiff may recover on the first cause of action it is necessary to establish by proof that the def



it did it intending to vex or annoy Plaintiff Pooler, or with an intent to . This being so, it appears to the Plaintiff having two causes of action, pleading of different facts and the different elements, has a right to have a separate trial submitted to the jury for them to determine, with the strict understanding, that so far as simple damages are concerned there can be but one recovery. The Court granted the motion and an exception noted. Call in

---

JAMES DUBEL

Witness on behalf of defendant, being sworn and testified as follows:

Direct Examination.

Q: My name is James Dubel and I am employed by Mountain States Telephone and Telegraph Company and have worked for them approximately from the 1st of April of 1916. At the present time I am employed as repair man and have held this position for approximately three years. I reside at 425 South Idaho, Butte, Montana, and have resided in Butte, Montana since the 1st of November, 1912. During all of the time I have been employed as repair man by the Mountain States Telephone and Telegraph Company in Butte, Montana. My duties

(Testimony of James Dubel.)  
as such repair man is to call on  
I report at 8:00 o'clock and when  
me I take the trouble given out  
of Butte, and vicinity. I do all  
pairing and repairing instrumen

I recall sometime during the month  
1932, going to the vicinity of Butte,  
Butte, Montana, and near as I can  
date of that was November 5th. I  
a ticket we use for *recover*. By  
repair, the daily repair report.  
with me. I don't have any independent  
of the incident out in the vicinity  
Street, in early November, 1932.  
independent recollection of having  
don't have an independent recollection  
date, but I arrived at that from  
made to my company and that  
piece of paper which I now have

This defendant's Exhibit 3, the  
is in my own handwriting and the  
recovery ticket known as Form  
made out by me at the time discussed.  
date of this is 11-4-32. I thought  
November, that I was there but  
it to the 4th.

Mr. GUNN: At this time we have  
defendant's Exhibit Number 3.

The COURT: It is admitted.

Document received in evidence

x	County (Show Name)	x	Check	City	Rural	Exchange Inc. Town Toll Line or Esti- mate No.	Acc't Code	Description	Quantity Recovered		Auditor's Check
									Good Rtd to Store- room	J. W. Re- fused on Job	
					✓		18R	337 Trans.	1		
		✓					18R	329 Trans	1		
	Silver Bow Co				✓	Butte	13X	C S Drop		300	
					✓		13X	B P Drop		250	

x Use these columns when reporting poles, cross arms, outside wire and other items affecting plant measurements.  
 Items marked "G" or "J" Received at Butte Date 11-4-1932

Turned in by James M. Dubel  
 Workman

Received by..... Storekeeper  
 [184]

(Testimony of James Dubel.)

The WITNESS: On November 19, 1929, I received a call to go to 1829 Banks Street. I had been a fire and when I arrived there I found a garage in the rear of the lot had been burned. I drove into the south of this block on Banks Street, off of Marcia Street. I was driving a Roadster. After arriving there I found the car and looked the stuff over and proceeded to remove the wire from the ground. Defendant's Exhibits are the same I have seen before and I am aware of the marks indicating telephone poles. It has been agreed for the purposes of this case to the Telephone Company.

When I first went to remove the wire I stopped and stopped about here, indicating the spot with an X and the letter P. I got out of my car with my working belt and proceeded down the alley here and proceeded over to pole marked A. I climbed that pole and cut three wires that were hanging from it. There was two twisted pair of wires and one of parallel wire. I then walked to pole marked C, a terminal pole on the corner of Marcia street and cut down the wires from that terminal pole, from four feet of the pole that drop towards pole B, and proceeded to pole and walked to this pole, proceeded to that pole and cut the wires into pieces. These we call the fixtures, that hold the

James Dubel.)

and. Then I proceeded to roll up  
pole C and pole B in one roll.  
Next, pole B and went up to the  
here, approximately 50 feet. When  
intersection I mean that is the point  
here, after the fire; and I rolled  
Then I went to this pole here and  
in one roll, pole A. I then took  
[185] of wire at that time and  
up of each other and took them up  
a about 90 feet in a northwest  
it is if I remember the direction  
or laid them down in a sort of

marked defendant's Exhibit 4, I  
and I was present when that pic-  
and familiar with what it shows. It  
is the scene that it purports to  
familiar with the locality to the west  
of the Pooler property and have  
with it for years. This Exhibit 4  
very plainly the territory to the  
west of the Pooler property. It  
shown of the Pooler property, the  
this garage that has been referred  
the poles appearing in the picture  
was that were there when I made  
line.

We offer it in evidence.

is offered in evidence marked Defend-  
and is returned herewith.

(Testimony of James Dubel.)

The WITNESS: On defendant will see the figure of a man a Where I am standing as shown placed the wire just about where ing on that ground. I don't know wire that I cut down on that day time.

I am familiar with and I remember wire I took down on that day. I took down a wire known as a twisted I mean two wires twisted together also referred to a parallel wire wire, flat insulation on the outside being parallel flat and as far as one wire, one unit. I was familiar with the wire I took down at

I have been with the Telephone in Silver Bow County, without record since April, 1916. I work Since that time the Telephone exclusively in this kind of work in Silver Bow County, up to the time of the a 1932, what we call twisted pair. Those are the only two kinds of service wires. The wires I took down were

I did at your request locate the kind of wire that I have referred to and some of the wire I referred to. And that wire that I secured was



James Dubel.)

on the 4th day of November, 1932,  
at 1000 Lakes Street, and the condition is  
as near as I remember.

marked defendant's Exhibit 5 is the  
first referred to as having secured  
This is not the wire that I took  
it was recovered at another point.  
in evidence marked Defendant's  
returned herewith.

: This part of this roll Exhibit  
twisted pair. I am now referring  
twisted together; and this wire  
known as the parallel wire and it  
lies inside the insulation which  
is here.

Exhibit 3 imparts the information  
upon my filing that out and filing  
many that this is a copy of the ma-  
terial service,—taken out of service as  
defendant's Exhibit 3 shows about a  
quantity of wire as taken out of service.  
I estimate on my part and I arrived at  
approximately the amount of [187] strands  
and the approximate distance but  
I do not know it. At your request I took the  
approximate quantity of parallel wire which  
I also measured of the twisted pair wire. I  
measured of parallel wire of 140 feet and  
of twisted pair wire. I also measured and weighed  
of twisted pair wire and that weighed

(Testimony of James Dubel.)  
5 pounds. From that information  
the weight of 300 feet of twisted  
feet of parallel wire to be between

I did that work on November  
Mr. Pooler's residence about bet  
in the morning. I wasn't there  
over half an hour to forty-five m

I do not know Mr. Pooler and  
I could not say that I had ever  
I came into this court room. On  
at the time I did that work I s  
Pooler yard but don't know wh  
not recognize Mr. Pooler here a  
time. I can't recall any convers  
who was there only that I said  
and he said "Yes". And I wen  
and finished up my job and g  
drove away.

Q. You heard the testimony  
Mr. Hemenlay and Mr. Malloy  
Mr. Pooler said "Hello"—one  
Mr. Pooler was the one that tes  
Arthur"?

A. Yes sir.

Q. And their testimony as  
that occurred at that time betw  
whoever was there. You heard

A. Yes sir.

I do not recall any such conv  
I would have [188] if it occu

nes Dubel.)

with reference to having on a  
with a collar turned up. That is  
I am concerned. On that day I  
that we call a sort of striped pair  
alls, but what we call hole-proof,  
opper jacket. At no time in 1932,  
that sort of work in town with a  
large turned up collar. I heard  
reference to a conversation and  
t that a truck would come back  
up.

ou know did the Telephone Com-  
w County ever send a truck to  
s kind?

Ve object to this on the ground  
irrelevant and immaterial.

Sustained.

: In connection with my work  
re that is going out of service, I  
it in the year 1932, or 1933, by  
truck coming for it. So far as I  
ticular occasion I did not have  
y time of a truck coming to pick

t any time up to the present, and  
ime prior, shortly prior to No-  
e thereafter and up to June 20,  
f ill-will towards Mr. Pooler.

imony here about someone going  
er yard after Mr. Pooler's acci-

(Testimony of James Dubel.)  
dent and going in there and taking  
I remember of going down there  
latter part of June, 1933. I drove  
office to Harrison Avenue, and I  
drove east on Marcia, and I stopped  
intersection of the alley on Marcia  
runs behind the Pooler garage  
to [189] Marcia Street and I stopped  
and got out of the car and walked  
picked up some wire laying in  
didn't go in the gate, not to my  
go in the gate. At that time I  
of Mr. Pooler having been hurt  
there by the Wire Chief, the test

To my recollection I was not  
the Pooler yard at any time on  
and I would remember it if I  
that wire that I took down on  
Mr. Pooler's yard.

I would not swear that the  
the yard, some time in the latter  
was the wire that I had taken  
4, 1932, but it looked similar to  
taken down. The wire that I took  
ber 4, I put about, approximately  
80 feet northwest of the Pooler

Cross Examination

By Mr. DAVIS.

The WITNESS: On Defendant's  
identification, which is a picture

James Dubel.)

place, I have indicated with the  
4 the approximate point at which  
look from the Pooler yard was  
it; and that would be just north  
t was leaning against the fence.  
rolls there at the time. I was told  
at wire out of the yard. I have  
letters Z-1 the point where I  
the intersection of Marcia Street  
e is Marcia Street and here is the  
de, and [190] this is the street  
rth side of Marcia, and as near  
r it was about in there on that

g up Marcia Street and about the  
x, was there anything that would  
rection, the view of your car as  
ere you indicated, for a distance  
half a block away, a half a block

ay it would.

my car and the Pooler house was  
ouldn't say what kind of a fence  
ong the south side. It was a board  
ong the back yard from where I  
it would come up to my waist,  
half feet high.

told me to go and get the wire.  
was some wire in a yard at 1829

(Testimony of James Dubel.)  
Banks Street, and for me to get  
wire we used and pick it up. I  
of wire we used in our teleph  
picked it up because I thought  
Mountain States Telephone an  
pany. I carried it to my car  
of the car and then drove away.  
a coupe seat, glassed in and then  
back of the top. It has an ins  
with a ring around it on it.  
that day had that insignia on th

The type of car I used on th  
1932, when I went down to take  
pole was a roadster. I couldn't  
there was an insignia on that o  
there might have been an insig  
swear about it; if it had it was  
on the door, what they call the  
on the machine. [191]

I climbed the poles that day  
hooks; I had a safety belt, alway  
belt or safety belt. The poles  
are approximately 90 or 100  
three strands of wire running  
approximately 68 feet from t  
B to C. There were three str

When I got down there I  
been a fire at the northwest  
drove in there I saw that the wi  
in two over on this *stan*, over  
stood and had burned down. TH



James Dubel.)

ground on both poles. I couldn't see where this fire had happened, but I was there from the time they were there until I went and got the fire until I went and got between poles B & C were burned. Poles B & C were not burned between B & C. The wire was damaged but it had been there. I took that wire down and took it to the house, rolled it up and laid it out there in the yard and then afterwards I carried it to a point, 80 or 90 feet northwest of Mr. Pooler's corner that I was working at.

Exhibit 3, I say "337 Trans—or  
mitters" and that means transmitter.

In the next item "13X" is the  
moving drop wire; in other words  
it is to be hanging. The next item is  
the wire. I then add the figures 300  
indicates feet. In other words the  
wire was taken down entirely between all  
poles. With that 550 feet of wire  
I made three coils.

That Mr. Pooler did not give  
me that wire in the yard because  
I asked him? [192]

I had but very little conversation  
with him. He did not give me permission  
to put the wire in the yard and I did not under-  
stand his permission to put the wire in the  
yard. I asked with anyone and told them

(Testimony of James Dubel.)  
that I had left the wire in the  
sure of that.

I can't say that I noticed the  
baga can up alongside the fence  
wire out of the Pooler place.  
Pooler's permission to remove the  
his fence.

On defendant's Exhibit 4 I in  
standing there, and that is my picture  
of northwest of the Pooler garage.

Q. Is there a street just north  
were standing?

A. Well there is a street going

Q. How far is it from where  
in that picture?

A. Well I should judge the  
edge of the street or the curb line  
30 feet, maybe 40.

That is a street on which auto  
people walk on that street, I guess  
feet of non-serviceable wire with  
feet and that street and left it

I didn't know Mr. Pooler at

I should judge that this wire  
Exhibit 5, the twisted pair wire  
since 1917. The parallel wire  
to my knowledge since between

If this wire coil which is de  
were leaning like that against  
to become unfastened, I do not  
coil. It would remain as it is w

mes Dubel.)

become unfastened I do not think  
fastened that coil to keep it from  
is easier to handle; did it to keep  
coiling. Some of the insulation  
poles had burned off the other wire.  
rd question to say how long the  
l the other wire had been used  
poles between the points A & B.  
at I put the wire up there, but  
recollection to remembering that  
say that that wire had been in  
the twisted pair, probably had  
years or maybe more. The paral-  
sed until between 1928 and 1929.  
had been up there since 1928 or

the Pooler yard at any time to  
I climbed three poles that day and  
there just about 45 minutes. I  
n the poles and cut the wire down  
nd walked over to this street and  
came back and got into my truck  
only took 45 minutes. It would  
n hour and fifteen minutes, but I  
to that without seeing it demon-  
untain States Telephone and Tele-  
se a truck all the time for heavy  
and it carries men and wire and  
plies they are using. It never has  
picked up supplies for me nor for  
ould not say whether the big truck

(Testimony of James Dubel.)  
of the Mountain States Telephone  
Company has not gone to your  
Park and picked up wire. They  
purpose of picking up wire and  
used on heavy construction jobs  
ing on.

The Telephone Company permits  
whether or not the wire is of any  
serviceable and permits me to  
do not instruct me where to  
words they give me authority to  
cretion about [194] disposing of  
fit if it is unserviceable.

Redirect Examination

By Mr. GUNN.

The WITNESS: The Telephone  
trucks in hauling supplies and  
not in connection with this kind  
doing, but is in connection with  
tion work.

The street that Mr. Davis was  
he said was 30 feet from the po  
wire was this street right here  
hibit 4, and if I remember right  
street is Garfield, and it is the  
Banks, if I remember right.

I heard the testimony of Mr.  
that there was rubbish up the  
territory. I saw some rubbish  
of that locality.

James Dubel.)

reference to the wire between poles

you take that down?

show you the reason there?

poles here and here, is Marcia

from here to here?

at pole C, it goes to the pole C on

Marcia Street, I took this wire

if they had become loosened at

they would naturally fall down to-

cross Marcia Street.

called your attention to Exhibit

opinion as to whether that would

uncoil, and he also asked you why

your work do you also have occa-

sion rope? [195]

handle a long line sometimes 50 or

times I tie that too. I would say

it would not spring out.

Direct Examination.

Would it become uncoiled would it not?

Depending on what shape and how old

(Testimony of James Dubel.)

Redirect Examination

By Mr. GUNN.

The WITNESS: Mr. Davis figures 2-4 on defendant's Exhibit indicates the wire, when I took it out of the yard, and that was in the latter part of 1933.

Witness Excused.

---

DUNCAN STEWART

called as a witness on behalf of the State and duly sworn, testified as follows:

Direct Examination

By Mr. GUNN.

The WITNESS: My name is Duncan Stewart and I live at 1045 West Galen Street in Denver. I work for the Mountain States Telephone and Telegraph Company, and have been with that company about 7 years. The nature of my work is line work and installing and repairing out phones. During the early part of 1933, I was in charge of out phones. We had one man named James Dubel and I spent most of my time with him in installing out phones.

I have been in the court room on several occasions and today. I was not here the first two months of February, and March. As far as I remember, I spent most of my time installing out phones, occasionally something else.



ncan Stewart.)

up that had to be done. During  
ch, 1933, I had occasion to take  
1829 Banks Street. Before the  
day, when I was first called in  
is case, I did not have any inde-  
n of that occurrence, but I went  
ds of the company to find out  
ken out the phone at that time.  
e record and going out to see the  
ing the house I would say that I  
ne out. I have with me the record  
shed my recollection and that is  
heet.

marked defendant's Exhibit 6 is  
ve left-in station. By left-in sta-  
ation that has been disconnected  
I recognize this paper as having  
ession some time. It has my  
n it; this is my signature at the  
g. This was in my possession the  
33.

(Testimony of Duncan Stewart

DEFENDANT'S EX

received in evidence without  
follows:

The M. S.

REMOVE LEFT-IN STAT

Exch.....

Date issued 3-23-33

Ser. No. of Disc. Ord. 0-4126 Date of

Address 1829 Banks

Tel. No. 3302

Serv. & Eqpt. 2 F R- D

Remarks .....

U. G Ter.

Dist. Ter.

Bdg. ....

Line	U. G. Pr.	Dist. Pr.
------	-----------	-----------

Non-Coin Box	Sub Coin Box	Pub. & Semi- Pub. Coin Box	Hand Set	Mor Te Se
-----------------	-----------------	-------------------------------------	-------------	-----------------

534A

51AL

Inst. or W. C. OK No. 378

Date Removed 3-24-33

Installer Stewart

uncan Stewart.)

Comp.	Issued 7/7/32	Ro.
aken 6/8	TEL 3302	
	NAME FRED W POOLER	
	DES. RES	
	ADDR. 1829 BANKS AVE	
	CL. HD.	
	ALST.	
	&	
	JU.	
	JU. CL. HD.	
	SE. & R.	
	2 FR	D
		3 00
	BILL 6/8/32	









mean Stewart.)

: I don't know whether I could put a check in the left hand column at 29 Banks Street, on that day remember that I have not memorized marked by numbers instead of ad- how found the number and it is put a red check mark after it. Exhibit 7 I can tell that I had y and that covers 6 hours of my s another sheet to go for that day. did 12 jobs besides probably visit- ozen or so. During that period of g of 1933, I would say that that of my ordinary day's work.

S: I was not here when Mr. t I read the reporter's transcript that you gave to me and I read t me visiting there and getting a my conversation. I do not recall occurrence and I absolutely would rrence if it had occurred. I heard testimony and Mr. Malloy's testi- recall any such occurrence as they would have recalled that if it had inly would recall anything as un- shovel to dig out that wire.

r. Pooler but I have seen him here a. I do not know Mrs. Pooler. I r. Malloy or Mr. Hemenlay before

(Testimony of Duncan Stewart.)

Cross Examination

By Mr. DAVIS:

The WITNESS: I have no a of what took place down there went to the house and took the p

Q. And you would not have about it if the attorney for the T did not have you go to the recor records. You had forgotten?

A. Well I knew I had taken the house; anytime I drive by remember.

Other than that I would not k what time of day it was. I don't and woman I saw there and I d the phone was in the kitchen. I ber where the telephone was.

On defendant's Exhibit 2 I se by Mr. Dubel 2-4 to indicate th wire was at the time he took it don't remember whether or not when I went out. I don't remem in the yard. I can't say I remem can as I came out. I remember t the rear and maybe I remember gone there the other day, and r remember there was any snow member what type of car I us Model A, 1930. It is a coupe wi



(Testimony of Duncan Stewart.)  
the Pooler corner and C, across  
heard his testimony that he had  
drops between those poles. The t  
ferred to is on pole C. From that  
time there were lines running s  
line running from that termina  
have not any independent recall  
occurred there that day.

Q. But you think that if what  
to had occurred you would recall

Mr. DAVIS: We object to  
and also leading.

The COURT: Sustained.

Recross Examination

By Mr. DAVIS:

The WITNESS: I said there  
work shown on that time sheet for  
8 hours a day and I was paid for  
another page to this for you see  
corner it say "Sheet 1".

Witness Excused.

ARTHUR W. MERKLE

on behalf of the defendant, being  
ed as follows:

irect Examination.

S: My name is Arthur W. Merkle  
2 West Park Street in Butte, Mon-  
ed in the Life Insurance business  
t business I have a copy of the  
enced Mortality Table in my pos-  
ectancy of life of a man 57 years  
th as taken from the American  
e of Mortality is 16 5/10 years.

ness Excused. [205]

---

HARRY D. BLAIR

on behalf of defendant, being duly  
s follows:

irect Examination.

S: My name is Harry D. Blair  
43 West Mercury. I am employed  
nk and Trust Company as a Note  
e had a great deal of experience

(Testimony of Harry D. Blair.)

Mr. DAVIS: We will admit to  
Mr. Blair.

The WITNESS: I have with  
Interest Table Book.

Q. Will you give us the amount  
quired which, if invested at 6%  
proximately \$1800.00 a year for  
end of which time the principle was

A. I am afraid not; it would  
figure that out.

Mr. GUNN: May the court  
Davis, in order to hurry along with  
witness be excused and return  
answer?

Mr. DAVIS: We have no objection  
alright.

Mr. GUNN: You understand  
over the period of 16½ years the  
as the interest should be used up  
\$1800.00 per year. You may be  
come back when you have that figure

Witness Excused. |

---

DR. H. W. GRE

a witness called on behalf of the  
duly sworn, testified as follows:



H. W. Gregg.)  
Direct Examination.

Q: I may explain, it has been  
evident for plaintiff that Dr. Gregg, as  
admitted, the privilege of the plain-  
tiff.

A: My name is H. W. Gregg, and  
I am a licensed and practicing physician  
in Silver Bow County, Montana, and  
I have practiced for 15 years.

Q: We will admit the qualifications

A: I am a graduate of the Medical  
College of Colorado, and am now with  
the plaintiff and have been in such position

with the plaintiff Fred W. Pooler  
for some time in June, 1933, that I  
was caring for his wife in 1933,  
for June. I knew him before June  
while visiting there in my capacity as  
a surgeon in June, 1933.

Q: At the house of the plaintiff, I think,  
on June 20, or possibly June 21, and he  
the day before he had been carrying  
the ash can in the back yard and  
it had fallen up in some wire and had fallen;

(Testimony of Dr. H. W. Gregg and that he had very intense pain how he had gotten to the house some of the neighbors had taken lying in bed when I first saw pain apparently. He said that his legs or his body that it hurt brought to the hospital, put at his care. X-rays of his back and the next day, I believe, and then he was [207] in the hospital I believe record here, but I imagine about just a guess. During that time treatments for pain. We had a brace before he was allowed to get up finally went home. I saw him at twice after he went home. He was in the back; I advised him to get more pictures, which he never did. brief is the history of the case.

If the records show that he was on the 12th of September, 1933, I had found him long. On my first visit to him I would judge that he was a man of 60 years old. He was lying in bed with rather severe pain. I examined him thoroughly; made a neurological examination especially because he was complaining of pain in his back. I found no neurological findings of nerve injury; of course subjective findings of pain but no

H. W. Gregg.)

He was bruised on the right hip; bruise on the right hip at the side; pretty much all over the lower back; you would touch him in the lower part a great deal of pain. As far as the condition goes, this is again from I have a rather accurate picture of very hard of hearing. His tonsils small; didn't look particularly inflamed; recollect, had several rather bad times immediately thought of the thyroid and thyroid glands. As my recollection no enlargement of the thyroid gland at of the lymphatic.

any fracture of the sacroiliac joint, completed the picture at that time. I [208] under my direction shadowgraphed and I have those with me.

: It is understood I may show

Yes.

S: Defendant's Exhibit 9 for an X-ray picture taken by me, position and direction and it is true these three shadowgraphs are pictures or under my direction of Mr. Pooler or them as being of Mr. Pooler. by our expert technician and I Mr. Pooler. I know these are the Pooler because all our pictures are

(Testimony of Dr. H. W. Gregg taken by an expert technician and with the date and the patient's name on the picture used in the treatment.) I think the same technician is Miss Smart.

Mr. DAVIS: We will not object that they will be connected up if not we will move to have them

Mr. GUNN: If we don't connect ask that the testimony be strictly

The COURT: With that understood the doctor may testify.

The WITNESS: I am not the same technician; I am not the technician left but I can find

I found tenderness over the tenderness over the whole lower and he complained of severe pain that he had had a severe bruise on his back and until the pictures were taken we know whether he had a fracture. In the examination of the patient, observation of the X-rays I felt no severe bruising or spraining or arthritic disturbance as shown at that time. By that arthritic condition of rheumatism causing some spurting of the bone, mild throwing out of roundness of the bone so that you get a fuzziness in the picture of the bone, what we see

H. W. Gregg.)

point. These pictures were taken  
at his entrance to the hospital. An  
injury previously could not have caused  
what I saw in the X-ray, the fuzziness  
of the bone. I don't know how long that arth-  
ritis existed; I couldn't say in weeks.  
It existed for some time prior to the  
admission to the hospital, although the patient  
had no symptoms. At that time I did not  
see any swelling of the limbs from the feet to  
the hips, a slight swelling over the bruise  
on the right hip,—I think it was the  
cause of the swelling to my memory and the record  
of the swelling of the feet from the legs to

and many causes for such swelling  
at the age of Mr. Pooler, 57 or 58,  
from the feet to the knee, one is heart  
disease and kidney disease. Varicose veins  
of one or the other of the legs,

that swelling as I remember when  
He did have I don't see how one  
causal connection between his in-  
jury, and that swelling, unless he had  
swelling from the injury, that would cause  
to have a sign of veins blocked. I  
saw in right handed normal individuals the  
right arm a bit larger than the left; and in  
left handed individuals the right arm is usually a

(Testimony of Dr. H. W. Gregg.)  
little larger. There are probably  
causes [210] of absorption of calcium.  
Among them such as low grade ch  
injury to bone; and of course some c  
ance in the body; some disturbance  
nutrition of the body may cause ab  
cium.

Q. Did you find any condition to  
tion of calcium in the bones of plain

A. A mild thinning down of calc  
as near as you could tell from the  
bones looked thinned out a bit.

I don't mean they had gotten sma  
cal term doesn't mean anything, oste  
diminution of calcium,—the subst  
the bone leaving the bone in the same  
before, but the calcium minimized.

Q. What have you to say whether  
mal individuals the right sacroiliac  
sacroiliac joint are the same size?

A. What do you mean by the same

Q. The same width?

A. Do you mean the space between  
the sacrum?

Q. Yes.

A. As near as we can tell from  
there is often in normal individual  
symptoms, some slight variation b  
sides in normal individuals, or at l  
without any symptoms.



Dr. H. W. Gregg.)

the experience of men in your pro-  
the lower extremities of the body,  
ilium—sacrum region, that many of  
and ills of nature exist?  
are rather common in the sacroiliac  
over lumbar.

to better illustrate that by describing  
[211] that brings that about?

to know in mind the period of gestation,  
to have a bearing on the condition of  
in this case.

There are little defects in the develop-  
ment of the body in the womb, there are mild  
ones such as cleft palate, and sometimes  
defects in the lower back and show some-  
times what is called a marked spina bifida, where the  
vertebrae do not grow completely together, the back  
does not close, leaves a space. Sometimes there  
is a protrusion of the meninges and the  
meninges and the membranes around the  
brain protrude out and the patient dies: other  
times the protrusion is almost complete and we get no  
protrusion, the only way we know it would be  
by an X-ray, where we can see that there  
is not quite a complete closing. It is not in-  
frequent to find conditions caused by the re-  
tractions spoken of, it is not an uncommon  
thing to see it in X-rays.

In the examination of the plaintiff he did not  
note the incontinence of his urine to my knowl-  
edge. I would have made a note of it

(Testimony of Dr. H. W. Gregg.)  
if he did. I did not discover any  
kind as I remember while he was in  
may be wrong about that, but I don't  
was moderately hard of hearing at  
in the hospital. I did not, from the  
me, discover any reason for that.  
say he had scarlet fever earlier and  
now from the history but I did not  
before. I do not remember him com-  
ears and saying they had run because  
tion of scarlet fever.

Q. What have you to say as to a  
would cause a man's heartbeats to be  
minute?

A. Might be many causes; a man  
course a common [212] cause is a  
of the heart muscle, and might be a  
disturbance; might mean nothing as  
disease, but most likely in a man  
mean a mild weakening of the heart  
disturbance of the nerve conduction  
due to a mild weakening of the heart  
an old infection or bruise; a number  
affect the heart muscles, toxics, a  
mild weakening of the heart muscle  
ance of the conduction mechanism  
nerve mechanism.

Q. Would you say a man of t  
about 57, at the time of the acci  
walking caught his foot in a wire

Dr. H. W. Gregg.)

s back, his right hip, his right leg  
der, is it probable that such a fall  
lling of both limbs from his knees?  
at injury resulted in a blocking in  
lower pelvis, I don't believe so.

l any such condition in the pelvis,  
vein, that I could determine. There  
om the history of the patient and  
to indicate any such thing.

he common finding on examination  
f individuals of say the plaintiff's  
ain of pain in the lower back, in-  
or walk for any distance or to be  
eir back for any length of time?

a question that might have many

the common theory of the medical

ay be many causes: one, infection,  
; there are many causes. You can  
an of his age arthritis is a common

common finding in a man of his  
caused by arthritis? [213]

e so, or rheumatic disturbance of

tor, will you please describe and  
ary what you mean by the term just  
, spina bifida?

(Testimony of Dr. H. W. Gregg.)

A. Spina bifida may come in at the back, in the cerebral column in the child in the womb. As near the two parts of the spine fold over and close so that the spine is closed and you have no opening there. Sometimes in that position, at some time in the fetal life, there is a little defect and it does not close and we get an opening in the spine that does not **close over**. Sometimes that is a serious defect and the baby dies early in life due to that opening. At other times the closure may be complete and the skin grow over and not close until later in life and get a picture of what there is that phenomenon. They are most common in the fifth lumbar vertebra and that is where you don't get a complete closure.

Q. What do you say about the condition and the usual finding in your profession of the age of plaintiff under similar conditions who complains of dribbling his urine?

A. The commonest cause is a prostatic diseased prostate, an enlarged prostate.

That is more common in men than in women; the dribbling; more common with the male, and the complaint is more frequent about the age of plaintiff, 57 or 58, and above 50 and old age. There is no doubt an enlargement of the prostate gland is a generally accepted thing; it is generally

Dr. H. W. Gregg.)

profession that the prostate gland is  
in men about that age and with the  
have mentioned.

find any disease or injury to the  
of the plaintiff?

ed before he had subjective signs of  
l tenderness over the back; he had  
n of nerve injury.

signs are signs which the person  
from his own senses. Objective signs  
one else can tell without the person,  
physical signs, just as a chunk of  
feel it. As far as nervous diseases or  
plaintiff is concerned I found none  
ould obtain information from objec-  
and I had to rely entirely on what  
what he displayed himself.

Cross Examination.

S:

ESS: When I first met Mr. Pooler  
n bed. Well, that wasn't when I first  
don't remember how long before the  
w Mr. Pooler, but I had been taking  
fe in the hospital I imagine about a  
not notice any particular sign of  
m when I first knew him and I don't  
bent as he is now; I am quite sure he  
ight. When I found him in bed he  
se, apparently from pain, and when I  
s body or legs he would complain of



(Testimony of Dr. H. W. Gregg.)  
pain in his back. I made the usual  
medical profession does in an effort  
injury. He was very tender over  
back from the ribs down; he complained  
and dis-comfort. I put him at bed  
put him to bed and he was not allowed  
bed. I don't remember but I think  
[215] up. He complained of pain  
complained of it when he was elevated  
he was propped up for several days  
to the hospital. If the bill which came  
hospital shows that he was there 52 days  
When I said 25 days I may have been

If Mr. Pooler was given a bill for  
ices of \$100 that was probably the  
got, and \$2.00 a day for 52 days  
conforms with the rates charged  
and surgeons in the County of Sil  
time and I feel it is a reasonable  
services. \$156.00 for a room in the  
reasonable charge for those services  
Pooler. X-rays of the spine, 3 for  
reasonable charge. \$11.00 for the  
porter was a reasonable charge. The  
high stiff brace which reached clear  
to give back support and if I remember  
steel supports in it. I don't remember  
the brace as I simply sent him down  
type of brace made and he had the  
I saw it on him. It was made with



Dr. H. W. Gregg.)

ort for the back. \$11.00 would be a  
e for it. It was prescribed by me in  
f Mr. Pooler and I prescribed it to  
upport. We found when he was try-  
had some pain without the support.  
f bed at the time and I don't think  
ntil the brace was put on. The brace  
ed him in walking and it apparently  
tanding alone. For those reasons I  
ecessary to prescribe that brace and  
. I don't think I found any indica-  
e trouble in Mr. Pooler at the time.  
ber whether his prostate was ex-  
ime; I don't believe he had urinary  
time. As I remember when [216] I  
ly visible bruise he had was on the  
rked tenderness over all the back,  
rum region, not any black and blue  
the marked area was on the right,  
een on the left; on one side anyway.  
oler had enemas. I don't remember  
on of his rectum was so badly swol-  
that it was impossible to insert the  
ma bag, but possibly that might have

e heart condition of Mr. Pooler have  
trauma?

believe that heart condition and ir-

(Testimony of Dr. H. W. Gregg.)  
regularities and weakness of the heart  
caused by a fall on the back.

Q. Could some kind of a fall cause  
of heart beats of a patient?

A. By nervous connection possibly  
by a nervous upset at the time of the fall  
might have skipping of beats, palpitation.

A man weighing 185 pounds, suffering from  
and attempting to grab himself while  
falling and striking the ground on a  
sidewalk, approximately a foot above  
the ground, might have suffered shock  
to his nervous system. I found Mr. Pooler  
a highly nervous state when I first saw him  
very much upset.

Q. Might not that condition have been a  
condition which would reflect itself in  
beats?

A. I don't believe that caused a  
last for months in the way of heart  
might cause a temporary.

I think I said the back condition  
caused by injury.

Q. Would you not say that the condition  
you found in [217] Mr. Pooler and  
explained would have been a condition  
a severe blow?

A. Partly, yes.

Dr. H. W. Gregg.)

used the term rheumatic rheuma-  
s that the ordinary backache that

so many cases for backache people  
e of the causes only.

medical man to attempt to tell the  
man's back might ache would be ex-  
cept by complete examination.

find such a condition in the back of  
e time you first saw him in the hos-  
t of some rheumatism which might  
n bed for 7 weeks.

, after looking at the pictures, there  
ome old arthritic condition in the  
have, on top of the injury, kept him  
be keeping him in bed.

m around his home, I don't remem-  
times; I am not sure I ever saw  
before called for the injury, I think  
always saw him at the hospital. He  
prightly, getting around very well.  
to be suffering from rheumatism;  
were made. I was not treating him,  
his wife.

ite satisfied with my diagnosis of  
requested more X-rays. The reason  
e see if there might have been any-  
ould get from a different angle, as  
case we would like to have as com-

(Testimony of Dr. H. W. Gregg.)  
plete a series of X-rays as we can  
examination. I don't think we had  
Pooler high enough to show the  
find any trace of fractured ribs  
examination [218] and that would  
X-rays.

The absorption of calcium might  
three causes, low grade infection  
bone and thirdly some nutritional  
three of the common causes some-  
together. The most common of the  
would be low grade infection pro-  
would probably be a combination of  
grade infection.

I discovered only a mild, moderate  
bones in his back. I found no trace  
my examination of Fred Pooler  
rheumatoid, arthritis, which indicated  
injury of any kind. He gave me a  
injury, a broken ankle some years  
physical signs of it. That appeared  
pletely healed.

I said that the right arm of a right  
vidual might be somewhat larger than  
a left handed individual the left arm  
be larger. The cause of that is probably  
That might have a little difference  
but just slight difference.

We sometimes run into a condition  
of the iliac joint,—where the two ses-

Dr. H. W. Gregg.)

seems to be a little more separated  
side and that is in either man or  
I don't think I have ever seen a case of  
the iliac joint that one would be  $2\frac{1}{2}$   
as the other without symptoms. I  
think it would be twice as great perhaps  
symptoms. I have not seen very many  
cases in the last 2 months and I don't  
know of any separations of the iliac joints I  
I imagine I have probably seen 3  
year.

and that you would not expect swelling  
Mr. Pooler below the knee from an  
injury to the back [219] unless there were a block-  
age of the pelvis or groin in the vein  
in the leg.

I would not say that it could not have  
been an injury to the back would you?  
There were nothing to occasion the vein  
to be blocked up.

It is correct that when I first met Mr.  
Pooler in the hospital I found a muscularly strong  
man with a history of injury and in whom I found  
no injury prior to the one with which  
he was injured.

Indirect Examination.

EXAMINER.

QUESTION: If the plaintiff, Mr. Pooler,  
had had enemas in the hospital and had

(Testimony of Dr. H. W. Gregg.)  
complained of extreme pain when  
serted, a common cause for comp  
been his hemorrhoids under thos  
piles.

I found a general soreness ov  
joint, but from the pictures I c  
separation, enough to be of impo  
ence in the two sides.

Witness Excused. [22

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MISS ALICE SMA

called as a witness on behalf of  
duly sworn, testified as follows:

Direct Examination

By Mr. WALKER.

The WITNESS: My name is ALICE  
am X-ray technician at the Murray  
fendant's Exhibits 8, 9 and 10 for  
have seen before. I as X-ray techn  
pictures on the order of Dr. Gregg  
pose of identifying the picture of  
the picture a number; I have a sh  
I write the patient's name and ac  
number on it. This is my writin  
hibits. I am sure that the patie  
appears there is the patient who  
taken.



Miss Alice Smart.)

Cross Examination.

S.

SS: I have no way of identifying  
whs of a human being other than  
in other words, looking at this pic-  
t know whether it was a picture of  
Fred Pooler. I do not remember the  
ooler.

ble for pictures to become confused  
om because they are marked. The  
out on as soon as they are dry, after  
ped. I develop the picture right  
s the patient comes in.

That is all.

ER: We now offer in evidence de-  
bits for identification 8, 9 and 10.

[221]

They may be admitted.  
ved in evidence marked "Defend-  
, 9, and 10" and are returned here-

Witness Excused. [222]

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DR. H. W. GREGG

ther

Direct Examination.

ER,

ws:

SS: Defendant's Exhibit Number 10  
a picture of the pelvic region and

(Testimony of Dr. H. W. Gregg.)  
lower back of Mr. Pooler, taken and  
that is from front to back, when  
his back.

Q. And what, if any, indication  
from that picture, or can you, from  
the picture, ascertain any condition  
to the sacroiliac region?

A. Well I felt from looking  
time, and still feel that it does not  
Of course it does not show the sacroiliac  
but I thought it did not show a  
bone or sacroiliac joint here, or perhaps  
side is a little wider,—this is the  
space between those is not more  
many normal individuals without shadow  
is a fuzziness in here at the bottom of  
lumbar vertebra that I take to mean  
spina bifida or congenital phenomenon  
just a little fuzziness along the side  
here that looks like a chronic inflammation  
That was taken, I believe, the day  
The bowel was probably full of feces  
what caused this shadow here.

That fuzziness, that sort of thing  
developed in two days; that sort of thing  
weeks or months to develop. That  
ziness is not what I have referred to  
That condition of fuzziness could have  
oped from the time the plaintiff  
the time I took the picture.

Dr. H. W. Gregg.)

see anything in that picture that anything to you which might be injury such as the [223] plaintiff to you on entering the hospital?

't see X-ray evidence of an injury; injury to the bone in this picture.

defendant's Exhibit Number 9, a back of Fred Pooler taken higher g just the very upper edge of the a lumbar,—it is mostly of the lumbar ond, third, fourth and fifth lumbar

anything, do you see there that indi- cation that might result from the d by Mr. Pooler, the plaintiff herein, he was brought into the hospital?

't see anything that I feel showed bone.

m this picture the fuzziness I have a the lower region of the sacroiliac; little fuzziness up here, a little what ag, where a little exudate was laid e bone. You get just the tip of the in the other picture. Often the fifth a is not distinct, latterly distinct: be synonymous.

Exhibit Number 8 is a lateral pic- om one side to the other of Mr. r spine, mostly the lumbar it shows, e sacrum there; you cannot see much

(Testimony of Dr. H. W. Gregg.)  
lateral in the sacrum. I cannot see  
of injury in this picture. It shows  
fuzziness or arthritis; a little bit on  
the edges of the vertebra, they are  
ment, that is not out of line.

Q. But they show a condition  
arthritic condition you spoke of?

A. Probably due to arthritis. [

Q. So that from any one of the  
have taken, can you find any condition  
lead you to believe that Mr. Pooler  
injury on the date he was injured  
regions photographed by you?

A. I couldn't get X-ray evidence  
injury.

#### Cross Examination

By Mr. DAVIS.

The WITNESS: I do not consider  
hibit a very good shadowgraph, even  
man of his weight and all, it is hard  
there laterally, although it is fair.  
graph, defendant's Exhibit 8, from  
on is the sacrum.

Q. Do you find any indication  
the sacrum bulging in towards the  
inside of the patient?

A. It would not show in this picture.

It would not show in this picture  
taken laterally. Exhibit Number  
on each side, 12, 11 and 10. On the  
do not find any indication of pro-

Dr. H. W. Gregg.)

Exhibits 10, 11 and 12. Of course this was a fracture of the ribs, but I see no evidence of fracture of the ribs, but I see no indication on Exhibit 9 of an injury to the injury of which Mr. Pooler was injured when I found him in bed in the hospital.

Mr. Pooler it seems to me that there is a deviation out of alignment of the spine toward the right on Exhibit 9. Will you tell us if that is the case?

It is a shifting over this way.

5]

It means nothing.

Perhaps over to this side of the plate that means nothing; it all depends on the position of the ribs toward to get them absolutely straight-angled to the table.

It is not a shifting to the right in Exhibit 9, but a shifting of the spine of Mr. Pooler, because the angle of the ribs and the spine seem to me to be different on the two sides.

On Exhibit 10, that large cloudy appearance of the pelvic bones, as we call them, between the iliac joints, I imagine is the feces; it is the small bowel. That fecal matter covers the lower part of it; I think it is a little of the sacrum. To me there is a deviation on Exhibit 10 of a straight up and down line of the sacrum of Mr. Pooler. What appears to be a deviation in the middle, or about the middle of the sacrum, is what I feel to be the spina bifida.

252  
FRED W. T. GREGG vs.  
(Testimony of Dr. H. W. Gregg.)  
that I spoke of. I don't feel that  
have marked the top of the point  
with the letters 10-1.

Q. Now will you please indicate  
of that mark as it appears, the error  
which you call feces?

A. You cannot follow that down

Q. Well you understand that you  
Mark it 10-2. Now Doctor you point  
Walker rather high up in this picture  
referred to the cloudiness as a congenital  
non. Will you please tell us in lay  
understand what that means?

A. In here the fifth lumbar vertebrae  
extend out as well as the others; you  
out the structure of it so well, and  
ably a mild spina bifida.

Q. It seems to you that it was  
happened in the body of Mr. Pooler  
in the womb of his mother?

A. In the development somewhere

It is a phenomenon that was present  
born and stayed with him. In my opinion  
a defective development of the spine  
plete.

From the X-ray I could not make  
to the body of Mr. Pooler.

As I found this man in bed and  
tory and examined him and X-ray  
that he was pretty badly hurt; he had  
or bruise on that whole lower back  
find X-ray evidence of it. Now



Dr. H. W. Gregg.)

The condition of the patient and my first three pictures, I asked him to submit himself for further X-rays to come back. My exhibits 8, 9 and 10 were taken at the same time; two were taken and one was taken the day before. Exhibit 8 was taken 6-22-33; Exhibit 9 was taken 6-22-33; Exhibit 10 was taken 6-21-33, the day

Indirect Examination.

EXHIBIT.

DETECTIVE: Plaintiff's Exhibit E is a picture of the pelvic bones, sacrum, and the upper part of one femur. I can not see anything to interpret as injury there. This is a picture of the same portion of the body or ilium, as is portrayed by the pictures I have seen under my supervision and direct supervision. A better picture of that area than the picture of Plaintiff's Exhibit F is a picture of the upper part of the pelvic bone, sacrum and parts of the ilium on both sides. Observing the ilium sacral area is a little wider than this side, but, that is no more [227] than one may expect in an individual without injury. I do not see any indication of the fuzziness or the shadowing showing a little more up in the lumbar region where possibly is a little spurring,—I do not see any shadowing down in here; there is a little spurring in the lower part of a little spurring there. Plaintiff's Exhibit G is a picture of the lower end

(Testimony of Dr. H. W. Gregg.)  
—almost all the pelvic bones and part of the  
end of the femur. As I testified before, I  
in the lower lumbar and sacral region, I  
many phenomenon, and to me there is  
I could possibly identify as injury.

Q. Do you see any indication of  
or arthritic condition?

A. Well down here again, you do not see  
this area, it is too thick in there to  
it more up where the lumbar stands.  
Exhibit H is a lateral view of the lumbar  
spine seems to be in good line.

Q. Any abnormality there or evidence of  
A. A little fuzziness along here.

A. A little fuzziness along here, I do not  
see in the other pictures; shows a  
nitely here, fuzziness along those vertebrae  
tebra.

Q. That is the arthritic condition?

A. The same condition.

Plaintiff's Exhibit I is another lateral view of  
the lower spine and pelvis.

Q. Do you see any condition there that you  
interpret any condition there that you  
to believe there was an abnormality?

A. It sort of puts a man at a disadvantage to  
sit and look at these pictures at the same time.  
man who took them spent hours looking at them,  
he is rather at a disadvantage to look at them  
and glance; he is rather at a disadvantage to  
here and glance at them and say, "I don't see  
I don't see anything I could state with any  
certainty."

Dr. H. W. Gregg.)

the fuzziness here; the spine is in good  
here in the sacrum there seems to  
ect alignment.

Exhibit J is a lateral view of the lum-  
area. I see some haziness up here.  
ad from the history of the shadow-  
no evidence indicating injury.

ctor, taking the case of a male of  
f 60 years, following the occupation  
or manual labor, what have you to  
her or not at that age his earning  
s to diminish?

We object to that on the ground  
adation has been made and purely

Sustained.

ER: Exception.

ESS: I have examined all of the  
now and to me from those shadow-  
nothing which is X-ray evidence of

Cross Examination.

S.

SS: I examined those shadowgraphs  
ther this morning and they number  
On each of these Exhibits I spent  
minutes.

urately could a physician diagnose  
shadowgraph in 3 or 4 minutes?

that is probably the average time  
d on each plate. [229]

(Testimony of Dr. H. W. Gregg.)

You can look it over and tell as much as you can tell in about that time. It is customary to look at the outward symptoms and conditions in connection with the X-ray when you reach your conclusion. In this instance of course, I am Mr. Pooler.

Q. Are you testifying as a matter of fact that Mr. Pooler is not injured?

A. I am not; I testified to that. I think he has a rather bad injury. I could diagnose it, a sprain or bruise. It is an injury as might result from a fall.

Q. Would you say it is permanent?

A. I think his disability is going to be less permanent, yes sir.

I think he will be practically disabled as far as doing blacksmith work, I think he will ever be able to do it again. In any instance a man would have to fall a great many pounds to do himself a great deal of damage. It would depend on the age and previous condition of the patient.

Q. Let us assume 57, a man in the prime of life, robust, active and energetic, a man in the profession of a blacksmith?

A. I don't think I could answer that.

A man could slip on a sidewalk and injure himself. I understood a man did that yesterday. A man could be walking and have his heel catch on a nail

(Dr. H. W. Gregg.)

... to a concrete floor six inches below  
... f.

... could have reasonably happened in the  
... of a man robust, muscular man weighing  
... falling from a point on the sidewalk  
... above the ground, turning and strik-  
... violently, could he or not have been  
... ]

... have been badly hurt.

... any indication of injury in these shad-  
... point marked with the letters E-1  
... Exhibit E is the sacrum.

... your attention to the lines at the  
... which appear to be crossed, I will ask  
... your opinion, those lines at that point  
... on the Exhibit E?

... it indicates a congenital, anomalo  
... closure has not been completed.

... it in language that we could under-  
... congenital anomalo?

... also or defect in the formation of the  
... when the body is finally formed it is  
... that is a common thing in the sacral  
... lumbar area.

... that cross at the point E-1 appear  
... defect in Mr. Pooler's sacrum. To me  
... cracks. They might be cracks.

... Redirect Examination.

... ER.

... SS: I am convinced from my inter-  
... exhibit that it is not a crack. It

(Testimony of Dr. H. W. Gregg.)  
is as I said before an anomalo or sp  
opinion.

Re-cross Examination

By Mr. DAVIS.

The WITNESS: The anomalo  
crack in the organ at the time the  
womb. The anomalo developed no  
but just a failure to have closed. T  
cates at point E-1 that there is s  
with his sacrum.

Witness Excused. [23

---

DR. J. E. SHIELD

called as a witness on behalf of o  
duly sworn, testified as follows:

Direct Examination

By Mr. WALKER.

The WITNESS: My name is J  
am a physician and surgeon and  
and physician at St. James' Hospit  
tana, and have been such ten year

Mr. DAVIS: We will admit the  
Dr. Shields for all purposes in this

The WITNESS: I have heard a  
introduced in this case by the plain  
by Dr. Carman and Dr. Gregg. I  
from both physicians the history of



Dr. J. E. Shields.)

ere and the history of the case they  
given to them, Dr. Gregg and Dr.  
plaintiff Pooler, and the gathering  
l subjective symptoms after careful  
them. I also saw exhibited here  
owgraphs or X-ray pictures and I  
on to examine each and all of them.  
st me ask you, coming to the testi-  
ence to the enlargement of the thy-  
st have you to say as to the theory  
al theory?

re is at least three principal medical  
that it is due to water that is lack-  
erals in the water; second, trauma,  
third, that it is due to infection, to  
fection, but as to knowing what the  
is or the enlargement of the thyroid  
known. It is in exactly the same  
; we don't know the cause. [232]

erience as a practical physician and  
ing physician and surgeon I would  
auma or injury is a frequent cause  
more frequent causes which cause  
trouble are water and infection, in  
at it has contributed to this cause,  
the majority of cases we cannot get  
ury to connect with it.

stimony with reference to the plain-  
g about two beats per minute. That  
ally called myocarditis, that is it is  
to the weakening of the heart muscle.

(Testimony of Dr. J. E. Shields.)

Q. What effect does it have upon circulation?

A. The more dependent parts, particularly when a man is standing, circulation is poorer there and natural swelling because the blood does not should. You will get some in the condition becomes serious enough.

So far as I can recollect I have seen of myocarditis due to injury. Due to infection or else to advancing age is a little hard to state precisely; infection becomes effective most frequently; it deals on the condition of the blood in the heart; anywhere from middle life to 70 years of age, and then of course we consider, and we occasionally get in women whose circulation, heart and blood is better than men at 45, or women, better in life if it is due to age, in my experience in middle life, or even after middle life due to infection, but as far as I know in middle life it is always due to infection or I heard the testimony of the doctor, Dr. Coffin himself [233] concerning his diagnosis of voiding urine, and the complaint about the common cause of that condition in a man of the age of Mr. Pooler is enlargement of prostate. A cause of the enlargement is an ingrowth of fibrous tissue, and the natural consequence of advancing



(Testimony of Dr. J. E. Shields.)  
shadowgraphs. There is not a [23  
I examine from one to many, and  
covered my medical experience, since  
uated physician. X-ray was in use  
uated; it has covered the period of  
been practicing my profession and  
ered the time that I have been employed  
Surgeon at St. James' Hospital.

The shadowgraph procured depends on the angle at which it is taken, that is, it gives a little different view or direction of the individual; a slight deflection or a change in the picture. You have the shadowgraph as it is taken and you interpret the effect or view at which another view were taken perhaps of equal, your interpretation might vary.

Q. Having had occasion to listen to the testimony of Dr. Carman and Dr. Gregg and likewise the testimony of the plaintiff, as familiar as the circumstances would permit, having heard all the facts here given, what is your opinion as to whether or not, having in mind the pictures here exhibited in evidence, you would say to you to say whether or not the condition of the plaintiff is caused from any injury sustained by the defendant?

A. You mean the shadowgraphs?

Q. Yes.

A. The shadowgraphs in my opinion are not sufficient to show a fracture or injury, that is with the

Dr. J. E. Shields.)

ne patient; all these shadowgraphs  
acture.

ve you to say, referring now to the  
es, the lower extremes the sacroiliac  
ve you to say as to the frequency  
an beings are afflicted with disease  
tions of some kind,—the sacroiliac

lumbar and occasionally the fourth  
sacrum are prone to defects, that  
es are not perfectly formed at the  
r before birth; and that percentage  
as high as twenty-five and down as

r with the ailment or affliction re-  
es in common parlance as lumbago.  
tion we frequently find that a man  
compelled to assist himself in the  
ve illustrated by using both hands  
the chair when seated in order to  
t and it is rather difficult for them  
after they have arisen in a stooped  
a condition not uncommon in males  
about 60 years and younger. The  
for lumbago are chilling, that is the  
n very warm and becomes chilled,  
ined, which is more properly known  
cles; and in low grade infection; a  
e pain in the lumbar region and it  
he lumbar muscles or heavy muscles  
art of the back.



(Testimony of Dr. J. E. Shields.)

Q. What is the common finding in a group of individuals say 57 years of age, who complain of pain in the lower extremities, and inability to stand or walk for an extended period, and are compelled to remain on the flat for some time?

Mr. DAVIS: We object to that question as being irrevelant and immaterial for any case; it is speculative; it does not relate to the facts in evidence before us.

The COURT: Sustained.

Mr. WALKER: Exception. [23]

Q. Basing your answer on these facts, that a man of 57 years of age, weighing about 180 pounds, in generally good physical condition, who was struck in a coil of wire, or roll of wire, on the ground striking the lower part of his back, his hip, right leg and right shoulder, and was unable to walk or stand or lie prone, and on an examination of the X-ray pictures showed multiple bony growths indicative of arthritis, but no evidence of fracture, dislocation, or displacement or dislocation, what would you be led to believe and have you any opinion as to the lumbar and dorsal spine?

A. If the X-ray pictures showed a haziness about the spine, or if it showed outgrowths or bony projections, I would be led to believe and have an opinion in this case as arthritis from the picture.



Dr. J. E. Shields.)

being equal, and X-ray picture  
ely after an accident or within two  
ould portray a better picture of the  
cident than one taken three or four

sability would you say would be  
rthritic condition such as you have  
ne X-ray pictures?

We object, there is no evidence here  
has discovered any arthritic condi-

Sustained.

SS: I examined those pictures this  
out a half an hour with Dr. Gregg.  
r. Carman's testimony.

call your attention to the exhibits,  
as from B to J; and to the pictures  
vidence by the defendant, the three  
from those shadowgraphs observe  
that is I mean now with reference  
eroiliae region and lumbar region,  
any condition of haziness or condi-  
ght consider to be arthritic?

haziness about the vertebra.

e indicates to me an inflammation.  
e get the inflammation there is little  
own out and a certain amount of  
to that fluid and round cell infiltra-  
other cells thrown out known as  
ad if about the bone there finally  
or less if the condition continues a

(Testimony of Dr. J. E. Shields.)  
calcium and cartilage being formed  
duces your haziness. If it shows  
cium has been thrown out and you  
or exudates. If it remains as pure  
inflammatory it shows as haziness  
and that is understood as arthritis  
what appears here *it* that haziness  
That shows a chronic inflammatory  
known as arthritis. That haziness  
condition may be due to either inj

Q. But in the given case, the c  
tiff, would it if it came from injur  
the time that Dr. Gregg took his p

A. What is the time?

Q. The patient entered the hos  
of June, 1933, and the pictures w  
the next three, four or five days  
21st and 22nd.

A. In my opinion it would not,  
to injury in that length of time.

Q. I will ask you, Doctor, wha  
one suffer or sustain by reason o  
as you have just testified to, no  
injury. What disability would r  
jury from the condition you have

A. It might be complete disabili  
hand you see many cases much wor  
make no complaint but go on for  
time.

Dr. J. E. Shields.)

I have testified to that I have observed that X-rays could result in permanent

All the shadowgraphs here and parallel shadowgraphs that have to do with the region. From my observation and shadowgraphs, for the purpose of I did not discover anything indicating a fracture. I will have to qualify; the inflammatory process could be or could be due to an infection, but in my opinion there is no fracture pictures that I have observed in this

Cross Examination.

Q. When you speak of this haziness observed in the pictures to which Dr. [239] as faint would you tell us whether it is faint, or very very definite? A. It is definite enough that you don't, in series of pictures, get a definite out-articular process of the vertebra, that I have observed. There is this—relative; now you can get a much more as the inflammation becomes more the callous is laid down and into that laid more or less calcium and salts. Pictures I have seen you don't get a [239] of any articular surface of could interpret that only as a chronic

(Testimony of Dr. J. E. Shields. inflammatory process; and which of the ordinary people would mean pain and stiffness,—that is the way it is. Every inflammatory process has been caused either by injury or by infection could result from injury, but in the tissues it is rather doubtful unless the patient has a focus infection elsewhere and never examined him to see whether there were torn tissues or bruised tissues as a result of the fall you speak about the fibrous cells in the bones and the calcium and the process formed as not also being a part of the healing process you are getting into a deep part of the healing process, involving the involvement passes too far it then becomes a chronic process. In the medical profession we use antibiotics and toxins containing part of the same disease to combat the disease which may be produced in this way; we give those to produce anti-bodies and when those have been produced they neutralize the toxins in the body. That is shown very clearly in the case of diphtheria for instance.

Q. Might not this condition which is as being somewhat shaded, might it be about the bone and calcium and calcium think are indicated by that picture? Have they been a part of the healing process?

A. That depends on when the injury was taken and when the injury happened.

Dr. J. E. Shields.)

immediately or within two or three  
then it would not be because time  
elapsed to produce the cloudiness.  
were taken several weeks after then  
ld be yes.

a shadowgraph where the calcium  
l the [240] bone becomes somewhat  
er and you took a shadowgraph, how  
of calcium evidence itself in the

does not become thinner, it becomes  
its diameter remains the same.  
o that you could see through it bet-

wn in the shadowgraph as darkness  
with the rest of the bone. In other  
not mineral matter enough in the  
the ray and therefore the ray passes  
ur film is cloudy.

you see any indication in the shadow-  
h you testified of that condition of  
x of calcium?

certain portions.

at have resulted from injury?

that it is rather common that most  
s in the back, that a large percentage  
t say most, or at least that has not  
ence in practice; I would say prob-  
twenty percent, about one-fifth. They

(Testimony of Dr. J. E. Shields.)  
have a stitch in the back or strain  
bothered. How long it would take  
another question that I would have  
cause it is so difficult to answer.  
have a patient now in which that  
has never cleared up. I have had  
in about from ten days to ten weeks  
in the back, or confining it to lumbar  
from three causes, one of which is

In examining and studying and  
shadowgraphs I put in about a half  
morning with Dr. Gregg, besides  
when Dr. Carman demonstrated to

Q. Doctor, suppose that Mr. Pooler  
you the day, or [241] to your hospital  
he was injured in an ambulance,  
bed, had complained very much  
tremely sensitive to pain, was un-  
rectum was so badly swollen that  
insert the tube for the enema; that  
bed for seven weeks; they had to  
wheel chair that he wore crutches  
there remained in bed partly and  
still is in the condition in which you  
in the court room. Would those facts  
opinion in relation to the examination  
shadowgraphs?

A. No.

It would not change my opinion  
shadowgraphs as to the fracture.  
that Mr. Pooler was not injured by



Dr. J. E. Shields.)

es not show in my opinion a fracture.  
e statement you have given to me  
e seen of Mr. Pooler and the facts  
by Dr. Gregg and Dr. Carman I  
he had been seriously injured.

ace that was exhibited here. That  
purpose of supporting not only the  
rea but to correct part of the spine.  
re not used for lumbago but they  
matory processes that involve the  
ondition would be a rather severe  
would put a brace like that with  
n a man.

perience as a physician I would say  
have serious injury from a fall  
walking on a walk, possibly a foot  
nd he suddenly had his feet wrapped  
s pitched head foremost, turned and  
nd violently. Basing my opinion on  
n the testimony of both physicians  
r I would think that it was rather  
a fall of that kind would cause the  
h they testified, with the exception  
the shadowgraphs [242] in my opin-  
fracture of the bone. Not referring  
raphs and basing my opinion on the  
h I heard given by the two physi-  
able that a fall of that kind would  
y to which they testified or might.  
a fracture of the back the haziness  
ferred might come after the fracture.

It might come some distance from  
have seen it some distance from a

The condition which Senator W.  
as dribbling, is frequently caused b  
man as prostatic disturbance or enl

Q. But Doctor, why would yo  
dribbled urine if the physician wh  
the hospital after the injury four  
of prostatic trouble, and there is  
effect that he had no trouble pri  
and the positive testimony of th  
had examined him that there was n  
ble, what would you say in your op  
the trouble?

A. Well it could be due to tw  
have an injury; one cystitis or inf  
tion in the bladder irrespective o  
prostate.

Incontinence of urine might be  
in the absence of proof of prostat  
ease, but incontinence is frequent  
mation of the bladder itself. Tha  
bladder could not be caused by i  
bladder itself was lacerated. In th  
I don't know.

I have told you briefly about a  
jured going through different pro  
When the bone is fractured there i  
clot and into that is thrown osteo  
cells and fiber callous, the walls tha  
tion tissue or healing tissue. Tha

Dr. J. E. Shields.)

243] what is known as callous and callous is laid down a calcium which is taken from the injured bone and in taking that calcium forms it into cartilage that has been formed in the bone. When you have an injury that breaks through the bone you have swelling due to the escaping of blood and you have inflammation. That inflammation should not cause the shadow or cloudiness that is referred to until the inflammation had subsided enough that it is granulation tissue and not a mass of callous if it is in bone, and that is the case. It does not show in the X-ray until about two weeks. Two weeks would be the minimum time that possibly show and in order to have it show in the X-ray you would have to have a severe injury. The second step in the process would be throwing out fibroblast. After that the injured tissue has been carried away and the next step would be the infiltration of capillary lobes, small blood vessels and cells intermixed. And then there are several more steps. The next step would be the formation of granulation tissue and this hardening of a sort of callous.

After three steps and after a sufficient lapse of time, possibly of two weeks that shadow would appear in an X-ray but the earliest time where it would show after a fracture would be about two weeks.



Dr. J. E. Shields.)

the court and jury this picture has  
You see that through these on the  
the viewing box.

as compared with the other picture  
turned from right to left; the other  
it brings this marking on the oppo-  
e viewing box. It shows the same  
der that was a defect, a congenital  
n existed in the body of Mr. Pooler  
of his birth and before birth; it is  
fida.

es not show the full sacrum of Mr.  
ff's Exhibit D does show practically  
. You are not able to see the full  
Pooler in defendant's Exhibit 10 as  
t has a darkened appearance in here  
s feces. [245]

words the feces in that gut makes it  
ee the full sacrum?

rticularly the coccyx or lower por-  
e.

t above this feces do you find an in-  
endant's Exhibit 10 of the two lines  
d to which you have referred on the  
as an abnormality, a congenital ab-

a portion of it right here.

-1 on Exhibit 10 indicates to me the  
ceding shadowgraphs, a defect which  
s a congenital or spina bifida; it just

(Testimony of Dr. J. E. Shields.)  
failed to close before the patient was  
do not form properly.

Defendant's Exhibit 10 is an anterior  
picture and I take it that the patient was  
his back and that the film was directed  
the picture. In plaintiff's Exhibit 10  
shows the same congenital defect.  
I take it that the patient was on his  
anterior posterior. I do not see any  
picture of any effort having been made  
body of the patient at a peculiar angle  
get a peculiar result and I do not  
not find indication there of a separation  
iliac joint. They are within normal  
opinion. There is a difference between  
comparing the two at the lower part  
hand side of the shadow box it is  
maybe twice as wide and I have indicated  
with the letters D-2; and going over to the  
opposite side of the shadow box on the  
find that the joint as it passes up  
this side than it is here and that is  
abnormalness in the joint and comes, in my  
normal limits. I do not believe that  
the articulation or movement of the

Q. Now you say that in your opinion  
was badly hurt. Now what in your

A. Basing my opinion on the testimony  
presented.

Q. And what would you say basing  
testimony was wrong with him?



Dr. J. E. Shields.)

at the X-rays?

testimony and all the facts you heard.

are you here representing the Mountain

Telephone Company?

What would you say, basing your an-

swers on the evidence presented here of Dr. Car-

roll, the shadowgraphs, the testi-

mony of Mr. Pooler, what would you say was wrong

with the spine and injury to the soft

tissues? What injury would have to be caused

to result in a heart condition result from in-

jury?

What injury where a man receives a vio-

lence from a sidewalk a foot above the

ground with great force?

What condition of heart condition?

What condition that would be reflected in the

heart beats, a condition that would

be felt in the legs, that when you pressed the

pit of the thumb; that the pit would remain

depressed? You heard testified here by the physi-

cian, Miss Callaghan of Mr. Pooler?

Your opinion, no.

What injury could result in an injury

to the heart that would cause a lack of circulation

?

(Testimony of Dr. J. E. Shields.)

A. You want it to the heart it

Q. I mean that would affect the  
tem? [247]

A. Injury to the arteries or to  
the large veins or large arteries su  
the lower legs. That is what we w  
phlebitis, or perhaps you would te  
sometimes following childbirth, w  
from injury sustained when the chi  
world, and of course that conditio  
infection as well as to direct inju

Thyroid swelling could be caused  
trauma or injury to any soft part  
the body may cause swelling. I o  
the condition designated as milk  
condition; I said a circulatory con  
due through the vein or arteries.  
woman may have it by direct inju  
or phlebitis is an inflammation o  
and due to that you get a swelling a  
may result from injury.

Redirect Examination

By Mr. WALKER.

Q. From the entire history of th  
the observations that you have ma  
pictures taken by Dr. Gregg and  
reference to the hazy condition a  
condition apparent there, would y  
condition was caused by the injury  
this case?

A. The haziness?

Dr. J. E. Shields.)

arthritic condition?

When you take Dr. Gregg's pictures on that they were taken within two following the injury, you cannot. [248]

Re-cross Examination.

S.

You say that the condition which you identify, as you have seen him and observed, as you heard the testimony of the physicians in relation to this condition or not say that that could have occurred on this fall?

Wouldn't with the pictures—

When talking about the pictures, I am talking about the general condition as the man has been in, the evidence by Dr. Carman and the nurse and the testimony of Mr. Carman of stiffness and lameness and all the rest? Is the stiffness and lameness has been in all the time more or less to the injury, but when you put the pictures into consideration, the injury cannot be attributed to the injury.

Could the injury be attributed to the fall?

When pointing out the arthritis.

Witness Excused. [249]

a witness, called on behalf of defendant,  
sworn, testified as follows

## Direct Examination

By Mr. GUNN.

The WITNESS: My name is FLOYD YOUNG. I reside at Helena, Montana. I have been employed by the Montana Life as actuary and underwriter. I have been engaged in that kind of work 18 years. The work of an actuary consists in figuring the probabilities of life and death in your rate of interest. The work of an interest and probabilities of life and death consists in ascertaining rates for life contingencies that don't involve life. The work of an underwriter involves the ascertainment of present value of a particular sum of money or income.

It would require the amount of \$100.00 at 6% interest to produce an income of \$10.00 a period of 16½ years, using up at the end of that time the principal; and to produce an income of \$10.00 under the same conditions would require \$102.92.

## Cross Examination

By Mr. DAVIS.

Q. How much principal sum would you have to provide \$1800.00 per year for 16½ years at the end of which principal and interest at the rate of 6% would be used?

Floyd Young.)

I object; my objection is based on it is an invasion of the province of suming a fact not in evidence.

: Overruled. [250]

edirect Examination.

Will you give us the same figure as me?

would produce an income of for 16½ years.

Witness Excused.

---

The defendant rests.

The plaintiff rests.

May it please the court we have to present to the court in the absence

)  
Comes now the defendant at the evidence and moves the court to order jury to return a verdict in favor of n each of the causes of action re-complaint herein on the following

1.

plaint does not state facts sufficient cause of action.

That the first cause of action re  
complaint:

(a) Fails to state facts sufficient  
a cause of action against the defendant.

(b) Discloses on its face, as a  
that plaintiff assumed the risk of  
ing or tripping over the wire by a  
main in his yard for a period of  
seven months and not removing it  
a place where he would not have  
over it.

(c) Discloses on its face that  
matter of law, was guilty of contributory  
barring a recovery, in not removing  
his yard or to a place where he  
fallen over it for over seven months  
looking where he was stepping and  
exercise due care.

(d) Discloses on its face that  
and omissions of the defendant were  
mate cause of plaintiff's injuries.

(e) Discloses on its face that  
have avoided the consequences of  
leged negligence or wrongful act  
exercising due diligence and reason  
own safety by doing what an ordi  
man would have done under the c  
wit: by removing the wire from t  
place where he would not have f  
of which could have been done  
effort on his part. In other words



his injuries, was entirely an avoid-

on its face that plaintiff's injuries  
been anticipated by the defendant  
ote as not to impose liability on the

3.

nd cause of action referred to in  
[252]

state facts sufficient to constitute a  
against the defendant.

s on its face, as a matter of law,  
sumed the risk of injury from fall-  
over the wire by allowing it to  
ard for a period of approximately  
d not removing it therefrom or to  
e would not have tripped or fallen

s on its face that plaintiff, as a  
as guilty of contributory negligence,  
ry, in not removing the wire from  
a place where he would not have  
or over seven months and in not  
e was stepping and thus failing to  
e.

s on its face that the alleged acts  
of the defendant were not the prox-  
plaintiff's injuries.

on its face that plaintiff could  
consequences of defendant's alleged  
ongful act or omission by exercising  
d reasonable care for his own safety

by doing what an ordinarily prudent person could have done under the circumstances, in removing the wire from the yard, or in not removing it where he would not have fallen over it, could have been done with very slight effort on the part. In other words, plaintiff's fall, and the injuries in his injuries, was entirely and proximately caused by defendant's negligence.

(f) Discloses on its face that plaintiff's injuries could not have been anticipated by a prudent person, and were so remote as not to impose liability on defendant.

4.

That as to each cause of action the failure of proof as to any negligence or omission [253] on the part of

5.

That as to each cause of action the plaintiff proves conclusively as a matter of

(a) That plaintiff assumed the risk of falling or tripping over the wire by it to remain in his yard for a period of approximately seven months and not removing it to a place where he would not have fallen over it.

(b) That plaintiff was guilty of negligence, barring a recovery, in not removing the wire from his yard or to a place where he would not have fallen over it for over seven months, and in not looking where he was stepping, and in not exercising due care.

alleged acts and omissions of the  
not the proximate cause of plain-

plaintiff could have avoided the conse-  
defendant's alleged negligence or wrong-  
on by exercising due diligence and  
for his own safety by doing what  
prudent man would have done under  
circumstances, to-wit: by removing the wire  
to a place where he would not  
touch it, all of which could have been  
accomplished by a slight effort on his part. In other  
cases, which resulted in his injuries,  
the injury was an avoidable consequence.

Plaintiff's injuries could not have been  
avoided by the defendant and were so remote as  
to be the result of a mere possibility on the defendant.

Denied.

Exception. [254]

We have one other motion, Your  
motion to set aside the verdict of the  
jury in favor of the defendant at the close of all  
the evidence and its motion for directed verdict  
has been overruled by the court, moves  
for an order withdrawing from the con-  
sideration of the jury the second cause of action  
in the complaint.

This is based upon the fact that there is  
no evidence of proof that the defendant, or  
its agents, or employees acted unlawfully,  
negligently, and/or maliciously, and a  
lack of proof of any fact entitling plain-  
tiff to exemplary damages.

The COURT: Denied.

Mr. GUNN: Exception.

Mr. GUNN: I wish to file a request that instructions 1 to 10 inclusive be given.

(Said request is as follows: This Cause.)

Comes now the above named defendant and requests the court to give the following instructions numbered 1 to 10 inclusive:

MILTON SMITH, JURY,

T. J. WALKER,

GUNN, RASCH, HARRIS,

The foregoing is all the evidence introduced upon the trial of said cause.

The COURT: The court refuses the requested Instruction Numbered 1.

Mr. DAVIS: The plaintiff objects to the refusal of the court to give Instruction Numbered 1.

The COURT: The court refuses the requested Instruction No. 2.

Mr. DAVIS: The plaintiff objects to the refusal of the court to give Instruction Numbered 2. [255]

The COURT: The court refuses the requested Instruction Numbered 8.

Mr. DAVIS: The plaintiff objects to the refusal of the court to give Instruction Numbered 8.

The COURT: The court refuses the requested Instruction Numbered 1.

The plaintiff objects and excepts to the court to give his requested Instruction Numbered 10.

The court refuses to give plaintiff's Instruction Numbered 13.

The plaintiff objects and excepts to the court to give his requested Instruction Numbered 13.

The court refuses to give defendant's Instruction Numbered 3.

Let the records show that the defendant excepts to the refusal of the court to give the requested Instruction Numbered 3.

The court refuses to give defendant's Instruction Numbered 4.

Let the records show that the defendant excepts to the refusal of the court to give the requested Instruction Numbered 4.

The court refuses to give defendant's Instruction Numbered 5.

Let the records show that the defendant excepts to the refusal of the court to give the requested Instruction Numbered 5.

The court refuses to give defendant's Instruction Numbered 8.

Let the records show that the defendant [256] excepts to the refusal of the court to give its requested Instruction Numbered 10.

The court refuses to give defendant's Instruction Numbered 10.

Mr. GUNN: Let the records stand as the defendant objects and excepts to the court to give its requested Instruction.

The COURT: The court proposes the plaintiff's requested Instruction.

Mr. GUNN: No objection to that.

The COURT: The court proposes the plaintiff's requested Instruction Number.

Mr. GUNN: No objection.

The COURT: The court proposes the plaintiff's requested Instruction Number.

Mr. GUNN: No objection.

The COURT: The court proposes the plaintiff's requested Instruction Number.

Mr. GUNN: Objected to as irrelevant and not involved within the issues of the case.

The COURT: I will amend the instruction by striking out "Or property."

Mr. GUNN: No objection as amended.

The COURT: Does the plaintiff object to the making of the amendment?

Mr. DAVIS: No, Your Honor.

The COURT: The court proposes the plaintiff's requested Instruction Number.

Mr. GUNN: Objected to on the ground that there is no evidence to substantiate the claim for punitive damages. [257]

The COURT: Overruled. Your objection is overruled.

The COURT: The court proposes the plaintiff's requested Instruction Number.



The same objection as to Number 7.

Overruled and note an exception.

The court proposes to give plain-  
instruction Numbered 11.

Objected to on the ground that  
the case on which to base,—  
cause of action based on wilfulness.

Overruled. Exception noted.

I am going to refuse to give plain-  
instruction Numbered 12.

Let the record show that the plain-  
objects to the refusal of the court  
to give Instruction Numbered 12.

The court proposes to give de-  
tached Instruction Numbered 1. Has  
objection or exception to the giving  
of the same.

We object to the giving of this  
instruction on the ground and for the reason it is  
confusing and with words that have nothing  
to do with the fact or evidence submitted in this  
case as asserted in this instruction for the  
purpose of prejudicing the jury.

Overruled. Note an exception.

The court proposes to give de-  
tached Instruction Numbered 2.

No objection.

The court proposes to give de-  
tached Instruction Numbered 6. [258]

Plaintiff objects on the ground and  
reason that it is confusing to the jury, and

the statement of the instruction to the facts introduced in this case correctly state the law.

The COURT: Overruled. Ex

The COURT: The court prop  
defendant's requested Instruction N

Mr. DAVIS: The plaintiff ob  
to the giving of defendant's Instr  
7 on the ground and for the reas  
tory negligence is not pleaded in t  
reason there is no evidence before  
case that tends to prove contribut

The COURT: Overruled. Not

The COURT: The court prop  
defendant's requested Instruction N

Mr. DAVIS: No objection.

Which said plaintiff's instruct  
be given by the court are as follo

Instruction No. Th

You are instructed that the pla  
not prove such of the allegations  
as are admitted in the answer  
herein. Any allegation of the co  
admitted in the answer of the d  
regarded as true.

Given:

BALDWIN,

Judge. [259]

Instruction No. Four.

Directed that negligence is the failure of a reasonable and prudent person to do what such a person under the circumstances would not have done.

IN,  
Judge.

Instruction No. Five.

Directed that every person who suffers damage by the unlawful act or omission of another from the person in fault and receives therefor in money, which is called

IN,  
Judge.

Instruction No. Six.

Directed that detriment is a loss or injury to a person.

IN,  
Judge.

Instruction No. Seven.

Directed that in any action for a breach of contract not arising from contract, where the defendant has been guilty of oppression or

malice, actual or presumed, the jury  
the actual damages, may give damages  
of example, and by way of punishment.

Given:

BALDWIN,

Judge. [260]

Instruction No. Ni

Oppression is an act of cruelty,  
exaction, domination or excessive

Given:

BALDWIN,

Judge.

Instruction No. Ele

The word 'wilfully', when applied  
with which an act is done or omitted  
a purpose or willingness to commit  
the omission referred to. It does  
intent to violate law, or to injure  
acquire any advantage.

Given:

BALDWIN,

Judge.

Which said defendant's instructions  
be given by the court are as follows

Instruction No. I

You are instructed, as a matter  
considering and determining the  
the defendant or its employees

wrongful act or omission, you must controlled solely by the facts of the l by the evidence which has been trial, and the law of the case as the court's instructions. Your con- e based upon facts shown by the t upon conjecture, surmise, or spec- e shrewd or ingenious such conje- or speculations may be. While neg- gful act or omission may be proved circumstantial evidence, the circum- thus proved, must not only tend to e, wrongful act or omission and that was an efficient proximate cause of they must equally tend to exclude able conclusions.

IN,  
Judge. [261]

Instruction No. 2.

e cause of an accident is that which, l continuous sequence, unbroken by ndent cause, produces the accident, hich the accident would not have

IN,  
Judge.

You are instructed that if you determine from the evidence that the scattering of said wire over said find that said wire did so spread due to any act or omission of the its employees, agents, or servants, be for the defendant.

Given:

BALDWIN,  
Judge.

Contributory negligence is such sion on the part of the plaintiff the want of ordinary care on his say, the want of such care as an person would have exercised un similar circumstances, and which or cooperating with, the negligenti ful act or omission of the defere ployees, agents or servants, if an cause of the injury complained o from a preponderance of the e plaintiff was guilty of such contri your verdict should be for the def

Given:

BALDWIN,  
Judge. [262]



Instruction No. 9.

in addition to demanding actual injuries, alleged to have been caused by the alleged fall, is also asking for expenses, that is, damages by way of pendants, for the acts of its servants. It is contended that before the defendant can recover under the issues in this case, for negligence, the plaintiff must prove that the defendant has been guilty of oppression or wrong presumed, against the plaintiff.

IN,  
Judge.

plaintiff's instructions refused to be admitted are as follows:

Instruction No. Two.

It has been seen fit to allege two counts of action. The first count is predicated on negligent placing by defendants, its agents, and employees, of the wire on the premises, together with the negligent handling by defendants, its agents servants, and employees same. The second count is predicated on wilful, oppressive and malicious injury by defendant, its agents, servants, employees, upon plaintiff's premises, and on the wilful, malicious, and oppressive acts of defendant, its agents, servants, and em-

ployees, to remove same. One of  
determine whether the wire was n  
and negligently allowed to remain  
premises by defendant, its agent  
employees, or wilfully, maliciously,  
placed, and wilfully, maliciously,  
allowed to remain upon plaintiff  
defendants, its agents, servants,  
It [263] could not have been neg  
fully placed.

If you find that the wire was n  
upon plaintiff's premises and ne  
to remain on same, and that the  
were proximately caused by such  
then your verdict must not exceed t  
of damages suffered by plaintiff,  
can the actual damages exceed the  
in the complaint, to-wit: the sum

If you find that the wire was  
upon plaintiff's premises and wi  
remain upon the premises, by defe  
servants, and employees, and tha  
any, sustained by plaintiff were pr  
by such wilful acts, then your ve  
see fit, include exemplary damages  
damages cannot exceed the amou  
the complaint, to-wit: \$105000.00  
that the plaintiff has suffered ac  
fore exemplary damages can be aw

Refused:

BALDWIN,  
Judge.

Instruction No. Eight.

'malice', as applied to torts, does not mean that which must proceed from a spiteful or revengeful disposition but a conscious injury to another, though proceeding from a careless or inattentive mind, not sufficiently cautious to avoid causing an injury to another. If the injury to the plaintiff was unjustifiable and the injury complained of by plaintiff is a question for the jury, malice is implied from such conduct.

IN,

Judge. [264]

Instruction No. Ten.

Injuries complained of are shown to be unjust, oppressive and of such a nature as to indicate a reckless disregard for the rights of the plaintiff, the jury, in their discretion, may award a reasonable amount as punitive damages in addition to compensatory damages.

IN,

Judge.

Instruction No. Twelve.

It is to be understood that whatever is done wilfully and with intent, if it be at the time wrong and unlaw-

ful, and known to the party, is in  
tion malicious.

Refused:

BALDWIN,  
Judge.

Instruction No. Thirte

You are instructed that a trespass  
forbidden is wilful and malicious. If  
evidence you find that plaintiff for  
ants, its agents, servants, and  
placing the wire upon his premises  
was a wilful and malicious trespass

Refused:

BALDWIN,  
Judge.

Instruction No. On

Before the defendant can be held  
plary damages, the plaintiff must  
defendant has been guilty of oppres  
actual or presumed, it is necessary  
to prove that the defendant, its ser  
employees, engaged in placing the w  
yard, were conscious of their condit  
of existing conditions from which  
likely or probably result to [265] p  
the defendant, its servants, agent  
wilfully and intentionally did som  
sulted in the alleged injury.

Refused:

BALDWIN,  
Judge.

defendant's refused instructions are

Instruction No. 3.

ucted that unless you find from a  
of the evidence that the wire was  
point alleged in the complaint by an  
defendant and that, at the time it  
or subsequent thereto, the defendant  
es, or employee, in the exercise of  
knew, or should have known, that  
spread and scatter and cover the  
point where plaintiff fell over it,  
the said wire did so spread and scat-  
the walkway, and that the plaintiff  
e verdict must be for the defendant.

IN,  
Judge.

Instruction No. 4.

ucted that it is the duty of a person  
diligence and reasonable care for  
and to protect himself from the  
quences of the wrongful act or omis-  
if he can do so by the exercise of  
nce and reasonable care and that he  
y such damages as he could not by  
such due diligence and reasonable  
ed, and you are further instructed  
narily prudent person, [266] in the

exercise of due diligence and reason  
own safety, would have appreciated  
any, from said wire at the point  
placed and allowed to remain, if y  
wire was so placed and allowed to  
the plaintiff could have avoided  
injury by the exercise of such di  
in removing the wire, or otherw  
should be for the defendant.

Refused:

BALDWIN,  
Judge.

Instruction No. 5

If you believe from the evidence  
of injury from falling or tripping  
plaintiff's yard was open and ob  
have been apparent to and apprec  
narily prudent person exercising c  
reasonable care for his own safety  
find from the evidence that the  
said wire to remain in his yard at  
in the complaint, you are instructe  
tiff assumed the risk of the injur  
your verdict should be for the  
though you may further find t  
requested the defendant to remov

Refused:

BALDWIN,  
Judge.



Instruction No. 8.

verdict for the plaintiff, and should  
at the capacity of plaintiff to labor  
has been reduced, by reason of his  
ould then determine how much per  
annum his earning [267] capacity  
ed, and you are instructed that the  
ages for decreased earning capacity,  
e such an amount as, being paid now,  
esent worth of what plaintiff would  
e received, in excess of his present  
y, per month or per annum, as the  
had he not been injured. In other  
d not be entitled to a verdict for a  
to the additional amount he would  
received from his earnings at vari-  
g the balance of his life, had he not  
ut would only be entitled to such a  
nts the present cash value of such  
nt, based upon the probable rate of  
ble on good security in this partic-

IN,  
Judge.

Instruction No. 10.

how oppression, or malice, actual or  
st the plaintiff, it is necessary for  
prove that defendant's servants or  
acing the wire at the point in plain-

tiff's yard where it was placed and  
remain there, if you find they do  
allow it to remain, were conscious  
and had knowledge of the condition  
injury would likely or probably result  
by their placing and leaving the wood  
they did, if they did, and that the  
intentionally did some wrongful act  
intentionally omitted some known  
suggested in the injury produced.

In the absence of such proof  
you [268] cannot allow him anything  
or exemplary damages.

Refused:

BALDWIN,  
Judge.

Thereupon, after argument of  
the court proceeded to instruct the  
jury as follows: [269]

#### COURT'S CHARGE TO

The COURT: Gentlemen of the jury,  
it becomes my duty to instruct you on  
this case. The law as I give it, you  
are bound on you. The decision of  
the case is for the jury to make. I may  
make a comment on some of the evidence  
and no statement made by counsel, and  
no statement made by the Judge upon the facts  
is binding upon you. You determine  
the facts said upon the stand; you determine

to be given, and you determine for the evidence leads to, if anything

en a great deal of evidence and a argument that seems to me apart in the case. The issues are few and many directly bearing on the issues of the time has been taken in the in determining what we call collateral matters essential perhaps to the proper determination, but matters equally important in determining the the case.

a who suffers detriment from the omission of another may recover and in fault a compensation therefor is called damages. Detriment is a suffered in person.

of those two instructions is simply ed Pooler suffered loss or harm in result of an unlawful act or omission of the defendant company here, or g in the course of their employment, to bring a lawsuit for the purpose ne amount of damages that he has as seen fit to do that and has filed 70] a complaint in the case, and the complaint is to fix the things that upon to determine. The plaintiff is e his case under oath and in writing a court. When he has done that he

has placed upon himself the burden of proving a preponderance of the evidence, a greater weight of the evidence, that what he says it is; that things happened as he says they happened, and with the injury and damage he claims he sustained, he says they came from the happening of the things he says they happened.

The complaint in this case states two causes of action. In other words it is based upon two theories. The plaintiff has a right in an action to state his case in as many ways as the law allows. In this complaint he has plead two theories, for the purpose of enabling him to recover. For each set of fact he is able to prove, and for each he can prove either set as set out in the complaint.

The complaint as I say contains two causes of action, the first cause is merely negligence, the theory of neglect or the theory of negligence; that theory gentlemen of the jury say that the defendant in the case failed to exercise the degree of care and caution which a prudent man would ordinarily have exercised under the circumstances. In the second cause of action goes beyond that and, for the purpose of recovering added damages, alleges that the defendant, his agents, servants and employes, unlawfully, oppressively, and maliciously, placed a telephone wire in his yard. Now the second cause of action has added an element that he must prove

s conduct. With [271] those exceptions, or causes of action stated in the complaint, are identical, and the facts that the plaintiff is required to prove in both causes of action are identical, excepting for the added element in the second cause of action.

As I said is bound to prove the allegations in the complaint as made to your satisfaction and the sufficiency of the evidence. To that is the only exception, and that is that the plaintiff need not prove such of the allegations in the complaint as are admitted in the answer to the complaint herein. Any allegation of the complaint which is admitted in the answer of the defendant may be regarded as true. However, for your safety and your information, there is an exception in either of the causes of action in the complaint admitted by the defendant. The allegations contained in paragraphs 1 and 2 which are identical in each cause of action. Paragraph one is that the defendant above named Mountain States Telephone and Telegraph Company, is and was during all of the times mentioned a corporation existing under and governed by the laws of the state of Colorado and engaged in the telephone business in the county of Silver Bow and state of Montana. The allegation of the complaint is admitted and no proof is required upon it. However, in addition to the statement of the cause of action, the complaint is merely identifying the defendant in



the case and proving that it is a local corporation that may be sued and to confer jurisdiction on this court by showing that while the defendant resides in Montana, the defendant's business is transacted in Colorado, a foreign state. It is not that [272] fact and because of that fact that this case is being tried here instead of in the court of the state sitting in this case.

The second paragraph which is the answer is as follows: That on the 5th day of November, 1932, said defendant Mountain States Telephone & Telegraph Company, a corporation, through its servants and employees, was engaged in the construction and maintenance of its system of telephone lines in the neighborhood of plaintiff's home which home is located at 1829 Banks Avenue, in the county of Silver Bow, state of Montana. It is not admitted and need not be proven by plaintiff that the telephone company was engaged at about the time of the injury here in making certain repairs and in laying telephone lines in the vicinity of plaintiff's home. However, it remains for plaintiff to prove each and every other allegation in his pleading before he can recover.

He charges here that on or about the 5th day of November, 1932, the defendant through its agents, servants and employees carelessly and negligently, placed the telephone wire in plaintiff's yard and



plaintiff and against his will, and  
d reels of wire was approximately  
ches to three feet in diameter and  
ely 140 feet of wire.

s upon the plaintiff here to prove  
is causes of action that the defend-  
a his yard the wire as alleged here  
as done without his consent. As I  
d to prove the allegations of his  
cannot give him anything in this  
ss it is within the issues made in  
the burden is upon the plaintiff to  
company or its agents actually put  
e three rolls of wire as alleged, and  
without his consent.

f that theory he has produced cer-  
ere. He has produced testimony of  
nself which you recall, in which  
nobody, he didn't know who, but a  
ble or Dubie placed this wire in his  
ence of two other men seemed to  
eory. On the other hand we have  
f the witness Duble appearing for  
who says that he did not place this  
rd. Now he and the plaintiff here  
personal knowledge concerning the  
sue, and there is a direct conflict.  
to be some supporting testimony  
ther witnesses for the plaintiff who  
ere present. But you will note that  
y that they heard the entire con-

The mere placing of the wire in  
sufficient under the allegation of  
must have been placed there with  
of the plaintiff Pooler. And it is  
to prove that want of consent is  
of his pleading here.

Upon that point you have heard  
Pooler and the testimony of Dubl  
tion is that each one of them was  
but where, as here, there is a direc  
the statements made by the two,  
ceases to exist, and it is for you  
the appearances of the witnesses o  
interest or lack of it in the res  
their knowledge or [274] means o  
their apparent candor and fairn  
circumstances in the case, where th  
fact that Mr. Pooler as I say to  
has some corroborative evidence  
sarily mean that he is entitled to t  
or that he should prevail in this ca

While you have the right to de  
the case, you can only decide in  
certain controlling rules of law,  
rules are that your right to judg  
evidence is not arbitrary, but is  
with legal discretion and in sub  
rules of evidence. That you are no  
in conformity with the declaratio  
of witnesses which do not prod  
your minds against a lesser num

other evidence satisfying your mind. The law is, that the defendant here is presumed to be any wrong. That presumption is based on the facts of human conduct, which are that people do not do things that are wrong. It is a presumption which the plaintiff must overcome by testimony which satisfies you by a preponderance of evidence that the facts are as stated. In other words that Doble put the defendant in without the consent of the plaintiff from the beginning. If you are not satisfied, gentlemen of the jury, you have no right to give the plaintiff in this case a verdict, and you may have great sympathy for him. It is a fact of human beings, whether Judge or juror, to sympathize away from either place, to sympathize with the man that is hurt. But sympathy has no place in a lawsuit. It is a cold, clear issue [275] and must be proven by evidence which

you are not required to decide in favor of. The declarations of any number of witnesses do not produce conviction in your minds. In other words, if you are not convinced by the preponderance of the evidence in this case that the facts as put in the yard by Doble,—though they were not put it in the yard, and that it was done without the consent of Mr. Pooler, there is no objection further because the foundation has been laid under the plaintiff's case and there is nothing further to be considered.

Then there are other rules and cause of counsel's statement du should in fairness call to your at fortunate, but it is true, that att in this court, practice in the st the rules of law and evidence are the rules relating to instructions a der the state law the judge cha writing before the argument open turns to the instructions he kno the court is going to give, as tho is written and not subject to chan Federal practice the judge talks l instructions on the law orally. B had state practice and being u tendency derived from it away, statements of law that don't meet of the presiding judge, just as cou made comment on the absence of apparently was the physician who t for some prior injury received November 5, 1932. The law on evidence is to be estimated not l own intrinsic weight but also acc dence which it is in the power of duce and of the other side to cont fore, if weaker and less satisfac offered when it appears that st satisfactory evidence was in the p the evidence offered should be vie Now, contrary to the opinion of

endant was not on an equal footing  
ff in producing Dr. Wilkie as a  
w says that persons occupying cer-  
with others cannot be compelled to  
and are not allowed to be sworn as  
at the consent of the person with  
e directly dealt. This is because  
n relations in life that are known  
relations. The confidential relations  
events the husband or wife being  
r against the other, without the  
ther to the marriage contract. That  
the eye of the law to preserve  
ily relations,—the confidence that  
in the home, within the four walls  
y makes its abode. There are other  
lation of attorney and client. The  
attorney has the right to tell any-  
that his client tells him without the  
ient. There is yet another relation  
ween the Father Confessor and the  
lock. It is required for decency in  
at when one goes to his confessor  
of making a statement and to ask  
his sins, that no one in the world  
at passed in the confessional box, or  
alled. So the priest cannot testify.  
with physicians, give them much  
7] we don't want broadcast; and  
ation of us find many things that  
ne public to know, and as a matter



of fact sometimes after we find  
didn't know. But anyhow the fact  
Wilkie, if he treated the plaintiff  
be used as a witness by the defen  
consent of the plaintiff. He could  
by the plaintiff without the consen  
ant. This portion of the instructio  
because of a mistaken view of the  
so if there is any argument based  
duction of the witness Wilkie th  
against the plaintiff and in favor

Now, we pass to the first element  
or first essential to be proven, whi  
of the wire in the Pooler yard, an  
it there against the will of the  
In dealing with all these matters  
jury, you deal with them just as  
and no doubt do, with the more in  
in your own life which involve yo  
personal relations and your deali  
or enemies; you deal in this matt  
your experience as men, and you  
your observation of the witness,  
ments that he makes viewed in th  
and the law as I give it to you, w

You ask yourself in this connec  
able to suppose that a man, star  
yard, would allow any telephone  
of wire in his yard after he pro  
being there. Ask yourself if it i  
you should allow him to lay it th



yourself if the reasonable thing would be to chuck the stuff out while the man could pick it up and cart it away. It is that apply to reason. What would you do under like circumstances? In other words, would the ordinary man,—and we are men, viewing life in different ways and from different experience, but ask yourself what you would have done? What is the reasonable thing for any man to have done under the circumstances? Draw your conclusion.

The defendant also charges that there were receipts and demands of plaintiff that the wire be removed from the yard. There is no proof to the contrary, and it appears from the defendant's proof that some wire was removed from the Pooler yard. There was no receipt made by plaintiff's counsel here and the defendant should have produced that wire if he didn't ask for it. He had a right to require the production of that wire and he didn't get it. So there is no inference to be drawn from the fact that the wire is not here that the defendant had it within his power if the defendant wanted the wire to get it here and show it to the jury that,—in the testimony of the defendant that he actually had control of the wire and that he made the defendant move it, and remove it and it was removed after that. I say that is not a fair argument, and it has no bearing on your decision in

this case,—the fact the wire is not  
had a right to bring it here, to  
have subpoenaed it under the process  
and had it here, and the defendant  
brought it here, so it is a 50-50  
there is no inference on that. Plaintiff  
a cement walk runs from plaintiff's  
the [279] alley in a westerly direction  
home of plaintiff. No contest of fact  
shows it. It is agreed that it is a fact  
said three reels of wire were  
placed to the north of the sidewalk  
the alley at a distance from said sidewalk  
approximately six feet. The defendant denies  
anything about that and it is up to you to  
prove to your satisfaction by a preponderance  
the evidence that such was a fact. Plaintiff  
further alleges that the tension on the  
said rolls was great. Have you heard anything  
on that? I am not going to prove it  
it, except that. Has any one here any  
of proof that there was great tension  
of those rolls of wire?

That on or about the 20th day of  
before plaintiff fell over said wire  
appliance—have you heard a word  
a clamp or appliance was there  
outer end of said wire on one of the  
the roll was either removed, broken  
placed on said roll in the first instance  
memory they proved by the state-

and any one of those things? And of the said end of the wire caused wind and spread much the same as that said wire sprung and unwound enveloped the said sidewalk.

The case that the plaintiff made by and that is the case that plaintiff is made by his evidence,—that there was rolls of wire and that the tension by something which was removed, purely placed on the roll in the case, and that the release of said end caused it to unwind and spread much as that said wire sprung and unwound enveloped the said sidewalk.

If there is an iota of evidence in favor of anything excepting that the wire caused the sidewalk. Ask yourself if there is any evidence on the rolls. Ask yourself if you can show that the clasp which held the wire in place was broken or became unfastened like a spring it sprung and enveloped the sidewalk. I say this is the case that the plaintiff made and that is the case he has got

to illustrate: If a man is charged with a gun, you cannot prove it with a knife. One must prove the case

on, about the 20th day of June Mr. [Name] and became entangled in the wire

and received the injuries of which he complains. Now as I say, plaintiff is required to establish the truth of the statements I have read by a preponderance of the evidence. He has any right here: the right to recover for the injuries that he suffered, the damages he suffered and so on are all based upon the truth of these statements, as well as upon the statements he makes with reference to the injuries that he suffered.

Now it is not for every injury that a person is entitled to recover damages. He is not entitled to recover for a negligent act or omission,—the doing of something or failing to do something that a prudent person would not do or would not do under the [281] circumstances. For negligence is defined as failing to do what a reasonably prudent person would have done under the circumstances, or doing what a person would not have done under the circumstances.

So if you decide that Duple was negligent within the Pooler place, you are not entitled to recover unless you can determine whether a reasonably prudent person under the same conditions might have done the same thing. If you decide that a prudent man might have done it, and that he ordinarily do, then there is no liability. The burden follows, because the burden is upon the plaintiff to produce facts showing that the servants or agents failed to do what a prudent person would have done.

would ordinarily have done under  
s of the situation, or did what such  
the existing circumstances would  
That again is a question for you.

arged in the complaint that these  
e wilfully. Wilfully when applied  
h which an act is done or omitted,  
purpose or willingness to commit  
the omission referred to. It ~~does~~  
intent to violate law, or to injure  
quire any advantage.

ould find as I say, that the wire  
yard of Pooler by the defendant's  
t it was done without the consent  
will and wish of Pooler, and that  
wire in the Pooler yard the agent  
ning that a reasonably prudent man  
done under the circumstances or  
omething that such a man would  
you have begun on the basis on  
case lays. From that point on, if  
d by the evidence in this case of  
those things, you have a right to  
aintiff should recover here, and if  
conclusion it is then for you to  
ner the other elements exist here,  
he plaintiff would have a right to  
the wire is found by you to have  
e Pooler yard by the witness Duple,  
without the consent of the plaintiff  
in placing it there Duple did some-



thing which a reasonably prudent ordinarily have done, it is still established that the thing so done was the proximate cause of the injury, if any, to the plaintiff.

The proximate cause of an accident is that which in a natural and continuous sequence produces the injury, without any new independent cause, produced by the defendant, and without which the accident would not have occurred.

Now it is not so simple as could be supposed to determine just what is the proximate cause of the injury. It is for you to say just what is the proximate cause of the injury here. Was it the placing of the wire in the yard? or was it the negligence on the part of some one for whom the plaintiff nor the defendant is responsible? Was it that wire to do as the witnesses say?

Before the plaintiff can recover, it must be shown that the defendant was negligent, and that his negligence proximately caused the injury here. The question of negligence is not one of such easy solution. The test is not what might have happened in a particular accident. So you are not called upon to be satisfied in finding [283] whether the defendant, by doing something that was negligent, prevented this particular accident; or whether a reasonably prudent man would have done otherwise of their duty under the circumstances existing at the time of the accident. It is again to the reasonably prudent man



against the defendant because you find a preponderance of the evidence that he might have done something, or its agent might have done something, that would have prevented the accident, and you ask yourself, and decide whether or not a reasonably prudent person could have foreseen something reasonably probable from the place where the wire was in the yard, if it was placed there by the defendant or its agent, that the injury to the plaintiff would result; not necessarily the exact result to him, but an injury that would result in the way that his injury, if he had not done what he says, did come about. In other words, you do not have to know that he is going to do something with that wire, if he did so tie it, or that under the conditions were such that a reasonably prudent man might have foreseen and prevented the result such as came about here, or that the injury, actually might come from the wire in the yard.

So the conclusion that you make, then you find that the defendant put the wire in the yard without Mr. Pooler's consent, and that the defendant acted as a reasonably prudent man would have acted, that the placing of the wire in the yard by the plaintiff was the proximate cause of the injury.

So you get down to the second cause of action, and you find all the things that I covered as the first cause of action. The proof in the second cause of action is identical with the excep-

tion, as I say, that the first cause of action is on neglect and failure to do what a prudent man would have done; which is based upon an oppressive and malicious act, rather than failure to do what the average man ordinarily do under the circumstances, this being an added element. The law is an action for the breach of an obligation arising from contract—that is the only kind of action existing in or identified with this case. The defendant has been guilty of oppression, either actual or presumed, the jury, in awarding actual damages, may give damages for the example, and by way of punishing the defendant. It is to carry that law into force and effect, the right, if the facts warrant it, to award more damages than the man has actually suffered. The second cause is placed in the complaint, and is asking that you give him, in this case, an action, all the money or compensation for the damage that he suffered actually. This is the second cause of action that you are asking for, more than he has actually suffered. In this case he is asking \$1000 for exemplary damages, because of the oppressive and malicious act on the part of the defendant's agent, and whatever you may give for the first cause, give him anything on the ground of the second cause, damages, will be given for the purpose of punishing the defendant and preventing others from doing the same.

and it is charged that the defendant  
did here did.

to demanding actual damages, as I  
for injuries alleged to have been  
of the [285] alleged fall, the plain-  
for exemplary damages, that is  
way of punishing the defendant for  
servants. You are instructed that  
defendant can be held liable under the  
case for exemplary damages, the  
prove that the defendant has been  
repression or malice, actual or presumed,  
plaintiff here. Now you will note from  
on that before exemplary damages can  
the burden is on the plaintiff to prove  
two things: That the defendant was  
repression, or that it was guilty of malice.  
in addition to negligence.

is an act of cruelty, severity, unlawful  
intimidation or excessive use of authority.  
find that the plaintiff is entitled to  
on the facts shown and on the law as  
t to you, actual or compensatory dam-  
at the defendant or Jim Duple was  
guilty, severity, some unlawful exaction,  
or excessive use of authority, you may  
because of action give damages in addi-  
damages given for the purpose of com-

reference to malice, which is the other  
that may justify the giving of exem-

plary damages, the law defines it as annoy or injure another person, or a wrongful act, established either presumption of law. So, in order plaintiff here is entitled to recover damages, you would have to find as I said of all the facts necessary to a recovery damages suffered by him, if any, that that Doble did what he did [286] vex, annoy or injure Mr. Pooler; of the facts that I have suggested had to your satisfaction by a preponderance, first, that the defendant owned that wire in the plaintiff's yard; that without the consent of the plaintiff that the defendant or its agent did; that a reasonably prudent man would have done under the circumstances of the case; and that and the further fact that it might have been foreseen at that time that some injury would result from the injury, if any, suffered by Mr. Pooler, would come from placing the wire there, you were prevented from finding a verdict in favor of the plaintiff here. That grows out of the fact that the defendant has pleaded certain affirmative defenses in this cause, among them the defense of contributory negligence.

Contributory negligence is such a defense as a bar to recovery on the part of the plaintiff as a result of his want of ordinary care on his part, or the want of such care as an ord

have exercised under the same or circumstances, and which concurring with, or without, the negligent or other wrongful act of the defendant, or its employees, agents, if any, is a proximate cause of the injury complained of, and, if you find from a preponderance of the evidence that the plaintiff was guilty of contributory negligence, your verdict should be for the defendant.

If the jury, if you find that, in leaving the premises, he says it was for a period of eight days, the plaintiff Pooler failed to exercise that degree of care and caution which a reasonably prudent man would ordinarily have exercised [287] for his own protection, he cannot recover, though you find that the allegation contained in both causes of action of the complaint are true, if you also find that the plaintiff was guilty of contributory negligence. Every man is required to use a reasonable degree of care, that degree of care which a prudent man usually exercise for their own protection. If he failed to do that and because of that failure, in connection with some wrongful act of another, an injury results, he has no right to recover, if he has contributed to the injury.

If, if you find that the plaintiff Pooler failed to exercise what a reasonably prudent man under the circumstances of the case would have done, and that the negligence of the defendant is the proximate, not the only cause, but one of the causes of the injury, if any, that the plaintiff suffered, then you cannot find for him.



because he has been guilty of concealment. And if you are unable to see the evidence that the spreading and the said wire over said sidewalk, if you said wire did so spread and scatter, was the fault or omission of the defendant, or of his agents, servants, your verdict must be against the defendant.

Now gentlemen, the issues are for you to determine. Any comment that I have made is without proof as I see them, is not binding on you. I have no right to color your view of the facts or to conduct with reference to the facts. I take the law from me; I take the facts from you.

You may retire in charge of the jury.  
(Whereupon the jury retires)

The COURT: Has the plaintiff any objection to the charge of the court?

Mr. DAVIS: Plaintiff wishes to object to that portion of the charge which the court instructed that "There is a direct conflict between the plaintiff's witness Duple in relation to the place that we have other witnesses who are a part of the conversation." And in that I wish to state to the court that our witness's testimony was that the witness M... he heard the full conversation, and the witness Heminlay said that the man place the wire on the inside of... called it to the attention of Mr. Pooler.



had spoken to the man who left the

T: Very well, the exception will be

: The second exception to the charge in relation to the law, as to what the should have done in order to have act wilfully, as being not a full and ment of the law, on the acts or con- of the witness Duple under the exist- nces.

T: Very well, that exception will be

: Has the defendant any exception ions as given.

: No Your Honor.

After the jury retired to consider of and subsequently returned into court dict, which said verdict is as follows:

[t and Cause.]

y in the above entitled case, find our or of plaintiff, Fred W. Pooler, and 89] defendant, The Mountain States Telegraph Company, a corporation, intiff's actual damages in the sum of nd dollars (\$20,000.00); and we fur- rdict in favor of plaintiff and against xemplary damages in the sum of 00).

Dated at Butte, Montana, this 2  
vember, A. D. 1935.

GEOR

That thereafter, and on the 25th  
ber, 1935, upon application of cou  
ant, the court by order duly and r  
in its minutes herein, granted the  
days within which to prepare and  
exceptions herein, said order being

[Title of Court and Cause.]

Upon motion of Mr. T. J. Walker  
defendant, defendant is herewith  
days in addition to the time allow  
which to prepare, file and serve a b  
herein.

Dated November 25, 1935.

JAMES H. BA

And now, within the time allowe  
granted by the order of the court  
sents this, its proposed bill of exc  
that the same may be signed, sett  
filed.

Dated this 31st day of December

MILTON SMITH

T. J. WALKER

GUNN, RASCH, HAI

Attorneys for I

The above and foregoing bill of exception of a true copy thereof, is hereby certified on this 31st day of Dec., 1935.

L. C. MYERS

T. J. DAVIS

Attorneys for Plaintiff. [291]

CERTIFICATE OF TRIAL JUDGE.

I, the undersigned Judge, who tried the above entitled cause, hereby certify that the above and foregoing bill of exceptions is a full, true and correct copy of the exceptions in said cause, and contains all the evidence introduced, and proceedings had, and exceptions taken in the trial of

the above cause, and that the above and foregoing bill of exceptions be, and the same be, by is allowed, settled and approved as a correct bill of exceptions herein, and

certified on the 27th day of January, 1936.

JAMES H. BALDWIN

United States District Judge  
for the District of Montana.

Filed on this 31st day of December, 1935. Filed  
[292]

Thereafter, on December 31, 19  
New Trial was filed herein, in the w  
following, to-wit: [293]

[Title of Court and Cause. ]

PETITION FOR NEW T

Comes now the defendant, by it  
petitions the Court to set aside the  
fore rendered herein and to grant  
trial in said cause upon the follow  
for the following reasons, to-wit:

I.

Insufficiency of the evidence to  
dict, as follows:

(A) The evidence is insufficient  
the wire was placed in plaintiff's y  
consent and against his will.

(B) The evidence is insufficient  
the plaintiff made any request or de  
the wire of any officer, agent, or  
defendant authorized to receive an  
a request or demand prior to June  
date of plaintiff's fall and injury)

(C) The evidence is insufficient  
there was any tension on the wire  
that the clamp or appliance which  
end of said wire on said rolls was  
broken, or insecurely placed on s  
first instance by the defendant, c  
employees. [294]

evidence is insufficient to prove that  
or its agents or employees had any-  
with or in connection with the prox-  
plaintiff's injuries.

evidence is insufficient to prove any  
ful, oppressive, or malicious act or  
the part of the defendant, or its agents,  
employees.

evidence is insufficient to prove any  
gligent act or omission on the part of

evidence is insufficient to prove any  
ligence or wrong on the part of the  
against the plaintiff causing plaintiff's

evidence is insufficient in that there  
as to the cause of the wire spreading  
six feet from the sidewalk to the

is no evidence that the spreading of  
the sidewalk from a point six feet  
s due to any act or omission of the  
of its employees, agents, or servants.

## II.

aw occurring at the trial, as follows:  
Court erred in overruling defendant's  
plaintiff's amended complaint.

Court erred in denying defendant's  
order requiring the plaintiff to elect  
of the two causes of action he would  
h motion was presented immediately

after plaintiff's opening statement (p. 2, lines 4 to 15).

(C) The Court erred in overruling objection to the introduction of any evidence (Trans., pp. 3 and 4).

(D) The Court erred in overruling objections to the following questions put to the plaintiff Pooler:

“Q. Did you know that the wire was unwound from the roll when you were in the house that afternoon of June 2, 1933?”

Mr. GUNN: To which we object on the ground it is incompetent, irrelevant and immaterial and not within the issue in this case. [295]

The COURT: Overruled.

Mr. GUNN: Exception.

A. No, I didn't know it until after either the night before because I went back way.” (Trans., p. 24, line 15)

(E) The Court erred in overruling defendant's objections to the following questions propounded to the witness Victor Mehler:

“Q. Do you remember, some time in the month of June, 20, 1933, seeing some one enter the house of Fred Pooler and remove therefrom a length of wire?”

Mr. GUNN: Objected to the questions as irrelevant and immaterial, based on the facts after the time of the accident.



COURT: Overruled.

ANN: Exception.

"I seen some one take the wire."  
(89, lines 19 to 26).

Court erred in sustaining plaintiff's  
the following questions propounded to  
*over* Hemenlay, and in denying the  
made in connection therewith, as

know what time it was the man came  
the phone out; it might have been in  
it was in the Winter; I didn't pay  
ion to what time of year it was. I  
ould a new garage.

at was that constructed of?

AVIS: We object to that as incompe-  
vant and immaterial.

COURT: Sustained.

ANN: May it please the court I will  
ame my question.

COURT: The situation is this, you  
n issues framed by the pleadings and  
nvolve the construction of a new  
confine yourself to the issues here.

ANN: As I understand it one of the

COURT: We won't argue about it, just  
rself to the question or issue here,—  
he defendant did or did not put the  
e yard; if he did, was it negligent to

do it; whether Mr. Pooler was wire and whether he was hurt, how much. Let us get down this case and quit playing around fine yourself to the issues in the

Mr. GUNN: We ask an e would like to make an offer to

The COURT: Make it oral

Mr. GUNN: We offer to p ness that Mr. Pooler, the plain working with him in building were in and about the point wh laying in the yard for a consid time during the Winter of 193

The COURT: I will not al along that line in view of the he saw the wire put in there a there. Now proceed and get do He testified he saw the wire pu it was there. The question is, d put it there. If it did, by wha

Mr. GUNN: We ask an e ruling of the court.

The COURT: You have

(Rep. Trans. p. 117, line 9, to p

(G) The Court erred in deny ant's motion for an order requir elect between the two causes of actio was presented immediately afte rested. (Trans. p. 119, line 18, to p

Court erred in sustaining plaintiff's the following question propounded to Dr. H. W. Gregg:

Now Doctor, taking the case of a male of the age of 60 years, following the occurrence of a blacksmith or manual labor, what would you say as to whether or not at that age learning capacity begins to diminish?

DR. GREGG: We object to that on the ground no proper foundation has been made for the question. It is purely speculative.

COURT: Sustained.

ATTORNEY: Exception.

DR. GREGG: I have examined all of the X-rays now and to me from those X-rays there is nothing which is X-ray evidence of injury." (Rep. Trans., p. 168, lines 10 to 15).

Court erred in denying defendant's motion to close of all the evidence for an order directing the jury to return a verdict in favor of defendant. (Trans., p. 190, line 15, to p. 193, line 10).

Court erred in denying defendant's motion for an order withdrawing from the consideration of the jury plaintiff's second cause of action. (Trans., p. 194, lines 1 to 12).

Court erred in refusing to give to the plaintiff's requested instruction No. 3, to the effect that the defendant duly [297] objected

and excepted. (Rep. Trans., p. 195,  
Said instruction was as follows:

“You are instructed that  
from a preponderance of the ev  
wire was placed at the point all  
plaint by an employee of the  
that, at the time it was so place  
thereto the defendant and its e  
mployee in the exercise of reason  
or should have known, that  
spread and scatter and cover  
the point where plaintiff fell  
find that the said wire did so s  
ter, and cover the walkway, and  
tiff did so fall, your verdict  
defendant.” (Rep. Trans., p. 20

(L) The Court erred in refusin  
jury defendant’s requested instru  
which refusal the defendant dul  
excepted. (Rep. Trans., p. 195, line  
instruction was as follows:

“You are instructed that it  
person to exercise due diligenc  
care for his own safety and to  
from the injurious consequenc  
ful act or omission of another  
by the exercise of such due di  
sonable care and that he can r  
damages as he could not by the  
due diligence and reasonable ca  
and you are further instructed

ident person, in the exercise of due and reasonable care for his own would have appreciated the danger, if said wire at the point where it was allowed to remain, if you find that was so placed and allowed to remain, the plaintiff could have avoided such injury by the exercise of such diligence in removing the wire, or otherwise. Verdict should be for the defendant.” (Trans., p. 205, line 23, to p. 206, line 8).

Court erred in refusing to give to the plaintiff's requested instruction No. 5, to which the defendant duly objected and excluded. (Trans., p. 195, lines 23 to 27). Said instruction is as follows:

I believe from the evidence that the injury from falling or tripping over a wire in the plaintiff's yard was open and obvious and would have been apparent to and avoided by an ordinarily prudent person exercising due diligence and reasonable care for his own safety, and you further find from the evidence that the plaintiff allowed said wire to remain in his yard at the point alleged in the complaint, you are instructed that the plaintiff assumed the risk of the injury therefrom. Your verdict should be for the defendant. Although you may further find that the plaintiff requested the defendant to remove

said wire." (Rep. Trans., p. 22). [298]

(N) The Court erred in refusing jury defendant's requested instruction which refusal the defendant duly accepted. (Rep. Trans., p. 195, line 2). Said instruction was as follows:

"If you find a verdict for the plaintiff, you should further find that the defendant is entitled to labor or earn money by reason of his injuries, you should determine how much per month of his earning capacity has been reduced. I am instructed that the award of damages should be increased earning capacity, if any, and an amount as, being paid no more than the present worth of what plaintiff probably have received, in excess of his earning capacity, per month of his life in the case may be, had he not been injured. In other words, he would not be entitled to a verdict for a lump sum equal to the present worth of the amount he would probably have received from his earnings at various times during the remainder of his life, had he not been injured. He would only be entitled to such amount as represents the present cash value of the amount, based upon the probability of the best estimate obtainable on good security in the locality." (Rep. Trans., p. 207, line 13).



court erred in refusing to give to the plaintiff's requested instruction No. 10, to which the defendant duly objected and excepted. (Rep. Trans., p. 196, lines 3 to 7). Said instruction is as follows:

"In order to show oppression, or malice, presumed against the plaintiff, it is necessary for the plaintiff to prove that defendant's servants or employees in placing the wire at the point in plaintiff's yard where it was cut and allowed it to remain there, if they did so place and allow it to remain there, were conscious of the conduct and had knowledge of the conditions from which injury to plaintiff's property or probably result to plaintiff by cutting and leaving the wire in the manner complained of, and that they wilfully and intentionally did some wrongful act, or intentionally omitted some known duty which resulted in the injury produced.

"In the absence of such proof by the plaintiff, the court cannot allow him anything for punitive damages." (Rep. Trans., p. 207, lines 1 to 3, p. 208, line 1).

The court erred in giving plaintiff's requested instruction No. 7 to the jury, to the giving of which the defendant duly excepted. (Rep. Trans., p. 197, line 1). Said instruction is as follows:

"The jury are instructed that in any action for a breach of contract there is no obligation not arising from con-

tract, where the defendant had acted with oppression or malice, actual or constructive, in addition to the actual injury, to give damages for the sake of punishing the defendant in the way of punishing the defendant (see *Rep. Trans.*, p. 199, lines 22 to 26). [299]

(Q) The Court erred in giving the requested instruction No. 9 to the jury (see *Rep. Trans.*, p. 197, lines 2 to 5). Said instruction reads:

“Oppression is an act of domination or unlawful exaction, domination or exaction of authority.” (*Rep. Trans.*, p. 197, lines 2 and 3).

(R) The Court erred in giving the requested instruction No. 11 to the jury (see *Rep. Trans.*, p. 197, lines 6 to 11). Said instruction reads as follows:

“The word ‘wilfully’, when used in connection with an act, implies simply a purpose or intent with which an act is committed, or make the act to be committed. It does not require any injury to the law, or to injure another, or to gain an advantage.” (*Rep. Trans.*, p. 200, lines 1 to 5).

This petition for a new trial is based upon the pleadings and papers on file in the case, and upon the minutes of the Court in said case, and upon the Reporter’s transcript of his

y taken, instructions given, and pro-  
t the trial, which transcript will be  
bill of exceptions to be settled and

Respectfully submitted,

ILTON SMITH

J. WALKER

UNN, RASCH, HALL & GUNN

Attorneys for Defendant.

ena, Montana, December 31, 1935.

vice of within Petition for New Trial  
mitted and receipt of copy acknowl-  
day of Dec., 1935.

T. J. DAVIS

L. C. MYERS

Attorneys for Plaintiff.

Filed Dec. 31, 1935. [300]

---

on July 11th, 1936, Order Denying  
petition for New Trial was filed and  
in the words and figures following,

t and Cause.]

YING DEFENDANT'S PETITION  
FOR NEW TRIAL.

e from a careful examination of the  
above entitled action, the briefs filed  
plaintiff and defendant herein and  
there cited and from independent

research that the defendant's petition is without merit,

IT IS ORDERED, and this does the same be and it is hereby denied.

Defendant is granted an exception and twenty (20) days after notice of this order in which to prepare, serve and file with the clerk of this court its propositions on this order.

Done in open court July 11th, 1936.

JAMES H. BALDWIN

United States

District of Maryland

[Endorsed]: Filed and entered July 11th, 1936. [301]

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Thereafter, on August 31, 1936, the Court granted the defendant's bill of Exceptions on Order Denying the same, which was duly signed, settled and allowed, and the same is being in the words and figures following:

[Title of Court and Cause.]

#### BILL OF EXCEPTIONS

BE IT REMEMBERED that on the 11th day of July, 1935, judgment was duly made in said cause in accordance with the verdict rendered in said cause, and that thereafter on the 11th day of December, 1935, the defendant filed in said Court its petition for a writ of certiorari in said cause, together with its assign-

petition for new trial and assignment of  
ing the title of court and cause, is in  
ures as follows:

### PETITION FOR NEW TRIAL.

the defendant, by its attorneys, and  
Court to set aside the verdict hereto-  
herein and to grant defendant a new  
cause upon the following grounds and  
ing reasons, to-wit:

#### I.

of the evidence to justify the verdict,

evidence is insufficient to prove that the  
ed in plaintiff's yard without his  
ainst his will.

evidence is insufficient to prove that  
03] made any request or demand to  
re of any officer, agent, or employee  
nt authorized to receive and act upon  
or demand prior to June 20th, 1933,  
aintiff's fall and injury).

evidence is insufficient to prove that  
tension on the wire in said rolls or  
or appliance which held the outer  
re on said rolls was either removed,  
ecurely placed on said rolls in the  
y the defendant, or its agents or em-

evidence is insufficient to prove that  
or its agents or employees had any-

thing to do with or in connection with the immediate cause of plaintiff's injuries.

(E) The evidence is insufficient to show that the defendant acted unlawfully, willfully, oppressively, or with gross omission on the part of the defendant or his servants, or employees.

(F) The evidence is insufficient to show that the defendant acted carelessly or negligently or with omission on the part of the defendant.

(G) The evidence is insufficient to show that the defendant acted with actionable negligence or wrong on the part of the defendant against the plaintiff causing injuries.

(H) The evidence is insufficient to show that there is no evidence as to the cause of the injury sustained from a point six feet from the sidewalk.

(I) There is no evidence that the wire over the sidewalk from the building therefrom was due to any act or omission of the defendant, or of its employees, agents, or servants.

## II.

Errors in law occurring at the trial.

(A) The Court erred in overruling the defendant's demurrer to plaintiff's amended complaint.

(B) The Court erred in denying plaintiff's motion for an order requiring the defendant to proceed upon which of the two causes of action he would proceed, which motion was presented after plaintiff's opening statement (see transcript, p. 2, lines 4 to 15). [304]



court erred in overruling defendant's introduction of any evidence. (Rep. and 4).

court erred in overruling defendant's the following questions propounded to cooler:

Did you know that that wire had come from the roll when you left your house moon of June 20, 1933?

NN: To which we object on the s incompetent, irrelevant and imma- not within the issues involved in this

URT: Overruled.

NN: Exception.

I didn't know it and I didn't know night before because I came in the ' (Rep. Trans., p. 24, lines 10 to 18).

court erred in overruling the defend- as to the following questions pro- witness Victor Mehring:

Do you remember, sometime after June seeing some one enter the yard of Mr. er and remove therefrom some coils

NN: Objected to as incompetent, ir- had immaterial, having happened after f the accident.

URT: Overruled.

NN: Exception.

, I seen some one take the wire." ns., p. 89, lines 19 to 26).

(F) The Court erred in sustaining objection to the following question of the witness *Gover Hemenlay*, and the offer of proof made in connection therewith follows:

“I don’t know what time the witness came and took the phone out of the house; it had been in February; it was in the house; I didn’t pay any attention to whether or not it was. I helped to build a new house.”

Q. What was that construction?

Mr. DAVIS: We object to the question as incompetent, irrelevant and immaterial.

The COURT: Sustained.

Mr. GUNN: May it please the Court, I will try to reframe my question.

The COURT: The situation is that the Court has certain issues framed by the pleadings, and I don’t involve the construction of the facts, so confine yourself to the issues.

Mr. GUNN: As I understand the Court, the issues— [305]

The COURT: We won’t argue about the issues; confine yourself to the question of whether the defendant did or did not put a wire in the yard; if he did, was he hurt; if he did it; whether Mr. Pooler was hurt by the wire and whether he was hurt, and if so, how much. Let us get down to the facts of the case and quit playing around. Just stick to the issues in the case.

ANN: We ask an exception and I  
to make an offer to prove.

CURT: Make it orally.

ANN: We offer to prove by this wit-  
Mr. Pooler, the plaintiff, and those  
with him in building the new garage  
about the point where the wire was  
the yard for a considerable length of  
g the Winter of 1932, and 1933.

CURT: I will not allow examination  
line in view of the fact Pooler said  
the wire put in there and knew it was  
r proceed and get down to the issues.  
d he saw the wire put there, he knew  
e. The question is, did your company  
e. If it did, by what right.

ANN: We ask an exception to the  
the court.

CURT: You have an exception." (Rep.  
117, line 9, to p. 118, line 14).

Court erred in denying the defend-  
for an order requiring plaintiff to  
the two causes of action, which mo-  
nted immediately after the plaintiff  
Trans., p. 119, line 18, to p. 121, line

Court erred in sustaining plaintiff's  
the following question propounded to  
c. H. W. Gregg:

How Doctor, taking the case of a male  
the age of 60 years, following the occu-

pation of a blacksmith or man  
have you to say as to whether  
age his earning capacity begins

Mr. DAVIS: We object to th  
no proper foundation has been  
speculative.

The COURT: Sustained.

Mr. WALKER: Exception.

The WITNESS: I have exam  
shadowgraphs now and to me  
dowgraphs there is nothing whi  
dence of injury." (Rep. Tran  
10 to 20).

(I) The Court erred in deny  
motion at the close of all the eviden  
directing the jury to return a ver  
the defendant. (Rep. Trans., p. 19  
193, line 30). [306]

(J) The Court erred in deny  
motion for an order withdrawing f  
eration of the jury plaintiff's second  
(Rep. Trans., p. 194, lines 1 to 12).

(K) The Court erred in refus  
the jury defendant's requested instr  
which refusal the defendant duly o  
cepted. (Rep. Trans., p. 195, lines  
instruction was as follows:

"You are instructed that u  
from a preponderance of the ev  
wire was placed at the point  
complaint by an employee of th

the time it was so placed, or subsequent to the time the defendant and its employees, or its agents, in the exercise of reasonable care, should have known, that the wire was so placed as to lead and scatter and cover the walkway at the point where plaintiff fell over it, if it is shown that the said wire did so spread and scatter and cover the walkway, and that the plaintiff did so fall, your verdict must be for the plaintiff." (Rep. Trans., p. 205, lines 8

The court erred in refusing to give to the plaintiff's requested instruction No. 4, to which the defendant duly objected and excepted. (Rep. Trans., p. 195, lines 18 to 22). Said instruction is as follows:

You are instructed that it is the duty of every person to exercise due diligence and reasonable care for his own safety and to protect himself from the injurious consequences of the act or omission of another if he can do so by the exercise of such due diligence and reasonable care and that he can recover only damages as he could not by the exercise of such due diligence and reasonable care have avoided. And you are further instructed that if a reasonably prudent person, in the exercise of due diligence and reasonable care for his own safety, would have appreciated the danger, if there was a said wire at the point where it was

placed and allowed to remain, said wire was so placed and all and that the plaintiff could have danger and injury by the exercise and care in removing the wire your verdict should be for (Rep. Trans., p. 205, line 23, to

(M) The Court erred in refusing jury defendant's requested instruction which refusal the defendant duly accepted. (Rep. Trans., p. 195, lines instruction was as follows:

"If you believe from the evidence danger of injury from falling the wire in plaintiff's yard was obvious and would have been appreciated by an ordinarily exercising due diligence and reasonable his own safety, and you further evidence that the plaintiff allowed to remain in his yard at the the complaint, you are instructed plaintiff assumed the risk of the from and your verdict should defendant, even though you may find that the plaintiff requested to remove said wire." (Rep. lines 12 to 22.)

(N) The Court erred in refusing jury defendant's requested instruction which refusal the defendant duly



Trans., p. 195, line 28, to p. 196, instruction was as follows:

find a verdict for the plaintiff, and further find that the capacity of plaintiff to work or earn money has been reduced, and that because of his injuries, you should then determine how much per month or per annum plaintiff's earning capacity has been reduced, and I am instructed that the award of damages should be based on plaintiff's reduced earning capacity, if any, would be the amount as, being paid now, would represent the present worth of what plaintiff would have received, in excess of his present earning capacity, per month or per annum, if he may be, had he not been injured. In the event you find, he would not be entitled to a verdict for a lump sum equal to the additional amount he would probably have received from his work at various times during the balance of his life, had he not been injured, but would be entitled to such a sum as represents the cash value of such aggregate amount, based on the probable rate of interest obtainable in the community for good security in this particular locality. Trans., p. 206, line 27, to p. 207,

court erred in refusing to give to the plaintiff's requested instruction No. 10, to which the defendant duly objected and excepted. (Trans., p. 196, lines 3 to 7.) Said instruction is as follows:

“In order to show oppression or presumed against the necessary for the plaintiff to defendant’s servants or employees wire at the point in plaintiff” was placed and allowed it to you find they did so place and main, were conscious of the knowledge of the conditions jury would likely or probably by their placing and leaving manner they did, if they did wilfully and intentionally did act, or wilfully and intentionally known duty, which resulted in duced.

In the absence of such proof you cannot allow him anything or exemplary damages.” (Repl line 18, to p. 208, line 1.)

(P) The Court erred in giving requested instruction No. 7 to the jury of which the defendant duly excepted p. 196, line 27, to p. 197, line 1.) was as follows:

“You are instructed that in breach of an obligation not a contract, where the defendant has oppression or malice, actual or jury, in addition to the actual

ges for the sake of example, and by punishing the defendant." (Rep. Trans., pages 22 to 26.) [308]

Court erred in giving plaintiff's refection No. 9 to the jury, to the giving defendant duly excepted. (Rep. Trans., pages 4 to 5.) Said instruction was as fol-

l-  
"Omission is an act of cruelty, severity, un-  
reflection, domination or excessive use of  
power." (Rep. Trans., p. 200, lines 2 and 3.)

Court erred in giving plaintiff's refection No. 11 to the jury, to the giving defendant duly excepted. (Rep. Trans., pages 6 to 11.) Said instruction was as

follows: "The word 'wilfully', when applied to the act in which an act is done or omitted, simply a purpose or willingness to do the act, or make the omission referred to, does not require any intent to violate the law, to injure another, or to acquire any advantage." (Rep. Trans., p. 200, lines 7 to 11.)

When a motion for a new trial is made and based on the pleadings and papers on file herein, and the minutes of the Court in said cause, including the reporter's transcript of his shorthand notes of the testimony taken, instructions given, and the proceedings at the trial, which transcript will

be embodied in a bill of exceptions to be filed herein.

Respectfully submitted  
MILTON SMITH, J.  
T. J. WALKER,  
GUNN, RASCH, H.  
Attorneys for

Dated at Helena, Montana, December 30, 1935.

Filed December 31st, 1935.

BE IT FURTHER REMEMBERED that after said petition for a new trial was submitted to said Court on May 1, 1935, and after said Court's decision and determination and the filing of said bill of exceptions on the 11th day of July, 1936, the Court entered its order denying said petition and dismissing the title of court and cause, with

#### “ORDER

It appearing from a careful examination of the record in the above entitled action, and the authorities there cited and from the research that the defendant's petition for a new trial is without merit, it is ordered that the same be and it is hereby denied.

The defendant is granted an extension of time for filing a bill of exceptions ruling and twenty (20) days after the date of making of this order in which to file the same and lodge with the Clerk of this Court a bill of exceptions on this order.

en Court July 11th, 1936.

JAMES H. BALDWIN,  
United States District Judge,  
District of Montana.

mes the defendant, and within twenty  
er the making and entering of said  
defendant's petition for a new trial,  
is, its proposed bill of exceptions and  
ame be signed, settled and allowed as  
erect bill of exceptions herein.

7th day of July, 1936.

MILTON SMITH, JR.,  
T. J. WALKER,  
GUNN, RASCH, HALL & GUNN,  
Attorneys for Defendant."

and foregoing is hereby settled, al-  
and ordered filed of record as a true  
l of exceptions herein.

tte, Montana, August 31, 1936.

BALDWIN,  
Judge.

Lodged July 28, 1936. Filed Aug. 31,

Thereafter, on October 3rd, 1936, appeal was filed herein, in the words following, to-wit: [311]

[Title of Court and Cause.]

PETITION FOR APPEAL

Comes now the above-named Mountain States Telephone and Telegraph Company, and feeling itself aggrieved by the jury and the judgment entered to the effect that it should pay \$1,001.00 damages, and \$89.77 costs, as plaintiff, on the 27th day of November, 1936, in the above-entitled cause, does hereby petition the Court for the reversal of said judgment and the whole thereof, and prays that this appeal may be allowed and that a writ of certiorari be granted, and that a transcript of the record of the proceedings and papers upon which the judgment were made, rendered and entered, and which have been authenticated, may be sent to the Court of Appeals, for the Ninth Circuit, and that an order may be made fixing the amount of the bond or other security which the defendant shall give for the stay of execution upon said appeal, and upon the giving of such security all further proceedings in the cause be suspended and stayed until the decision of the Court of Appeals on said appeal by the United States Court of Appeals for the Ninth Circuit.

Dated at Helena, Montana, this 3rd day of October, 1936.

MILTON SMITH,  
T. J. WALKER,  
GUNN, RASCH, HARRIS,  
Attorneys for Plaintiff

[Endorsed]: Filed Oct. 3, 1936.



on October 3rd, 1936, Assignment of  
ed herein, in the words and figures  
rit: [313]

t and Cause.]

### IGNMENT OF ERRORS.

the defendant, in the above-entitled  
akes and finds the following assign-  
s upon which it will rely upon its  
the appeal from the judgment and  
r denying defendant's petition for a  
aid cause, to-wit:

#### I.

rrered in overruling defendant's de-  
mended complaint. (R. p. 41.)

#### II.

w occurring at the trial, which are  
vit:

rt erred in denying defendant's mo-  
rder requiring the plaintiff to elect  
the two causes of action he would  
a motion was presented immediately  
opening statement. (R. p. 59.)

rt erred in overruling defendant's  
the introduction of any evidence.

rt erred in overruling defendant's  
[314] following question propounded  
Pooler:

“Q. Did you know that the [wire] unwound from the roll when you [unwound] that afternoon of June 20, 1933?”

Mr. GUNN: To which [ground] it is incompetent, irrelevant and not within the issue of the case.

The COURT: Overruled.

Mr. GUNN: Exception.

A. No, I didn't know it [unwound] either the night before because [unwound] back way.” (R. p. 87.)

D. The court erred in overruling [unwound] objection to the following question [unwound] the witness Victor Mehring:

“Q. Do you remember, sometime [unwound] 20, 1933, seeing some one enter [unwound] Fred Pooler and remove them [unwound] of wire?”

Mr. GUNN: Objected to [unwound] irrelevant and immaterial, [unwound] after the time of the accident.

The COURT: Overruled.

Mr. GUNN: Exception.

A. Yes, I seen some one [unwound] (R. pp. 165-166.)

E. The court erred in sustaining [unwound] objection to the following question [unwound] witness Grover Hemenlay, and [unwound] offer of proof made in connection [unwound] follows:

I know what time it was the man came  
the phone out; it might have been in  
it was in the Winter; I didn't pay  
ion to what time of year it was. I  
build a new garage.

What was that constructed of?

VIS: We object to that as incom-  
relevant and immaterial.

URT: Sustained.

NN: May it please the court I will  
re-ask my question.

URT: The situation is this, you  
main issues framed by the pleadings  
don't involve the construction of a new  
garage. Confine yourself to the issues here.

NN: As I understand it one of the  
issues is [315]

URT: We won't argue about it, just  
confine yourself to the question or issue here,—  
did the defendant do or did not put the  
garage in the yard; if he did, was it negligent to  
say that Mr. Pooler was tripped by the  
garage, whether he was hurt, and if so hurt,  
how much. Let us get down to the facts of this  
case. Don't quit playing around. Just confine  
yourself to the issues in the case.

NN: We ask an exception and I  
want to make an offer to prove.

URT: Make it orally.

NN: We offer to prove by this wit-  
ness, Mr. Pooler, the plaintiff and those

working with him in building were in and about the point w laying in the yard for a consi time during the winter of 1932

The COURT: I will not a along that line in view of the he saw the wire put in there there. Now proceed and get d He testified he saw the wire p it was there. The question is, c put it there. If it did, by wh

Mr. GUNN: We ask an ruling of the court.

The COURT: You have (R. pp. 193-195.)

F. The court erred in denying tion for an order requiring plaintiff the two causes of action, which moti immediately after the plaintiff rest upon the theory that the said two are inconsistent and repugnant (R. pp. 196-199.)

G. The court erred in sustainin jection to the following question the witness Dr. H. W. Gregg:

“Q. Now Doctor, taking th of about the age of 60 years, cupation of a blacksmith or ma have you to say as to whethe age his earning capacity begin

Mr. DAVIS: We object

proper foundation has been made and cumulative.

COURT: Sustained.

PLAINTIFF: Exception. (R. p. 255.)

Plaintiff erred in denying defendant's motion [316] of all of the evidence for an instruction to the jury to return a verdict in favor of defendant. This motion was directed to the entirety and to each cause of action upon the grounds that the statement of facts fails to state facts sufficient to support a cause of action against the defendant on its face that plaintiff assumed the defendant was guilty of contributory negligence, that plaintiff's fall was an "avoidable consequence", that plaintiff's injuries were too remote to impose liability on the defendant, and that the alleged acts and omissions of the defendant were not the proximate cause of plaintiff's injuries; and upon the grounds that there was a complete acquittal as to any negligence or wrongful act on the part of the defendant, and that the evidence proves as a matter of law that the defendant, by assuming the risk of injury, was guilty of contributory negligence, that plaintiff's fall was an "avoidable consequence", that plaintiff's injuries were too remote as not to impose liability on the defendant, and that the alleged acts and omissions of the defendant were not the proximate cause of plaintiff's injuries. (R. pp. 281-285.)

Plaintiff erred in denying defendant's motion for withdrawing from the considera-

tion of the jury plaintiff's second cause of action follows:

"Mr. GUNN: We have now presented to Your Honor. Comes now the close of all of the evidence, and I have directed verdict herein having been so directed by the court, moves the court for a ruling on drawing from the consideration of the first and second cause of action contained in the plaintiff's complaint.

Said motion is based upon the fact that there is a complete failure of proof that the defendant or its agents, servants, or employees acted unlawfully, wilfully, oppressively, or maliciously, and a complete failure of proof of a fact entitling plaintiff to punitive damages.

The COURT: Denied.

Mr. GUNN: Exception."

J. The court erred in refusing to grant the defendant's [317] requested instruction, which refusal the defendant duly excepted. (R. p. 287.)

Said instruction was as follows:

"You are instructed that unless you find by a preponderance of the evidence that the defendant was placed at the point alleged by the plaintiff by an employee of the defendant at the time it was so placed, or such other person as the defendant and its employees were negligent in the exercise of reasonable care, the defendant should have known that the work was dangerous to the plaintiff.



er and cover the walkway at the point  
ntiff fell over it if you find that the  
did so spread and scatter, and cover  
ay, and that the plaintiff did so fall,  
dict must be for the defendant.”

.)

urt erred in refusing to give to the  
t's requested instruction No. 4, to  
the defendant duly objected and ex-  
(287.)

tion was as follows:

re instructed that it is the duty of a  
exercise due diligence and reasonable  
is own safety and to protect himself  
injurious consequences of the wrong-  
omission of another if he can do so  
rcise of such due diligence and rea-  
re and that he can recover only such  
s he could not by the exercise of such  
nce and reasonable care have avoided,  
re further instructed that if an ordi-  
dent person, in the exercise of due  
nd reasonable care for his own safety,  
e appreciated the danger, if any, from  
at the point where it was placed and  
remain, if you find that said wire was  
and allowed to remain, and that the  
ould have avoided such danger and in-  
e exercise of such diligence and care  
g the wire, or otherwise your verdict  
for the defendant.” (R. pp. 299-300.)

L. The court erred in refusing the defendant's requested instruction which refusal the defendant duly objected to. (R. p. 287.)

Said instruction was as follows:

"If you believe from the evidence that the danger of injury from falling from the wire in plaintiff's yard was obvious and would have been appreciated by an ordinarily prudent person exercising due diligence and reasonable care for his own safety, and you further find from the evidence that the plaintiff allowed his children to remain in his yard at the point of the complaint, you are instructed that the plaintiff assumed the risk of the injury. If you find your verdict should be for the plaintiff, though you may further find that the defendant requested the defendant to remove the wire, (R. p. 300.) [318]

M. The court erred in refusing the defendant's requested instruction which refusal the defendant duly objected to. (R. p. 287.)

Said instruction was as follows:

"If you find a verdict for the plaintiff, you should further find that the plaintiff's ability to labor or earn money has been reduced by reason of his injuries, you should determine how much per month or year the plaintiff's earning capacity has been reduced." (R. p. 300.) [318]

that the award of damages for determining capacity, if any, would be such that as, being paid now, would be the worth of what plaintiff would reasonably receive, in excess of his present earnings, per month or per annum, as the case, had he not been injured. In other words, plaintiff would not be entitled to a verdict for an amount equal to the additional amount he probably would have received from his earnings at the same times during the balance of his life, had he not been injured, but would only be entitled to such a sum as represents the present value of such aggregate amount, based on the probable rate of interest obtainable on investments of this nature in this particular locality.”

.)

the court erred in refusing to give to the plaintiff the requested instruction No. 10, to which the defendant duly objected and excepted. (287-288.)

The instruction was as follows:

“In order to show oppression, or malice, or a presumption against the plaintiff, it is not sufficient for the plaintiff to prove that defendants or servants or employees in placing the fence at a certain point in plaintiff’s yard where it was not allowed to remain there, if you find that they did so place and allow it to remain, and that they were conscious of the conduct and had knowledge of the conditions from which injury would

likely or probably result to placing and leaving the wire in did, if they did, and that they intentionally did some wrongful and intentionally omitted some which resulted in the injury p

In the absence of such proof, you cannot allow him anything or exemplary damages." (R. p.

O. The court erred in giving plaintiff instruction No. 7 to the jury, to the effect that the defendant was not the defendant duly excepted." (R. p.

Said instruction was as follows:

"You are instructed that in a case of breach of an obligation not arising out of a contract, where the defendant has acted with intent of oppression or malice, actual and willful injury to the plaintiff by the jury, in addition to the actual damages, you may give damages for the sake of example, as a way of punishing the defendant." (R. p. 292.)

P. The court erred in giving plaintiff instruction No. 9 to the jury, to the effect that the defendant was not the defendant duly excepted. (R. p.

Said instruction was as follows:

"Oppression is an act of cruel and unjust exaction, domination or authority." (R. p. 292.)

Q. The court erred in giving plaintiff instruction No. 11 to the jury, to the effect that the defendant was not the defendant duly excepted.

ion was as follows:

ord 'wilfully', when applied to the in-  
which an act is done or omitted, im-  
y a purpose or willingness to commit  
e make the omission referred to. It  
require any intent to violate law, or to  
ther, or to acquire any advantage."  
(.)

III.

rt erred in overruling and denying  
petition for a new trial. (R. pp. 339-

rt erred in entering judgment for the

RE: Defendant prays that the judg-  
n said action be reversed, that the  
defendant's petition for a new trial  
nd that said action against said de-  
ered dismissed.

MILTON SMITH, JR.,

J. WALKER,

GUNN, RASCH, HALL & GUNN,

Attorneys for Defendant.

ena, Montana, October 3, 1936.

Filed Oct. 3, 1936. [320]

Thereafter, on October 5th, 1936  
Appeal was made and filed here  
words and figures following, to-wit:  
[Title of Court and Cause.]

ORDER ALLOWING APPEAL  
BOND.

An assignment of errors having been  
foregoing petition for appeal, IT IS  
that the appeal of the defendant  
titled action from the judgment  
given and entered therein in favor  
Pooler, the plaintiff, and against the  
allowed as prayed for in defendant's  
appeal filed herein, and that a certified  
the record, bill of exceptions, exhibits  
and all proceedings be transmitted to  
Court of Appeals for the Ninth Circuit  
States.

IT IS FURTHER ORDERED that the  
appeal in the penal sum of \$22,500  
and with sureties approved by the  
for the payment of all damages and  
defendant shall fail to make good its  
upon the filing of such bond with appeal  
further proceedings in this Court be  
the determination of the appeal in the  
of Appeals.

Dated this 5 day of October, 1936  
JAMES H. BA

[Endorsed]: Filed Oct. 5, 1936. [



on October 5th, 1936, Bond on Appeal  
n, in the words and figures following,

t and Cause.]

BOND ON APPEAL.

L MEN BY THESE PRESENTS,  
Mountain States Telephone and Tele-  
y, a corporation, organized and exist-  
laws of the State of Colorado, as  
Standard Accident Insurance Com-  
ration, organized and existing under  
of the laws of Michigan, and qualified  
to do business in Montana, to exe-  
undertakings, and to act as surety  
in the District and State of Mon-  
and firmly bound unto Fred W.  
ntiff above named, in the full sum of  
housand Five Hundred and No/100  
00.00), to be paid to the said plaintiff,  
torneys, successors or assigns, for  
well and truly to be made, said prin-  
ty bind themselves, their and each  
ssors and assigns, jointly and sever-  
these presents.

ND DATED this 2nd day of October,

, in the District Court of the United  
e District of Montana, in the above-  
ending in said Court, between Fred  
ntiff, and The Mountain States Tele-  
egraph Company, a corporation, de-

defendant, a judgment [324] was rendered against said defendant for the sum of Twenty One and No/100 Dollars (\$20,000) plus costs taxed at \$89.77, which judgment was entered on the 27th day of November, 1935, and said defendant petitioned for an appeal from said judgment to the Circuit Court of Appeals of the United States for the Ninth Circuit, and an order is made allowing said appeal, and said defendant is directed to prosecute said appeal to reversal of said judgment, and to answer all damages and costs to make its plea good.

NOW, THEREFORE, in consideration of the appeal, the condition of this obligation shall be that if The Mountain States Telephone and Telegraph Company, a corporation, shall prosecute said appeal to effect and answer all damages and costs, if it fails to make good its plea, the judgment shall be void, otherwise to remain in full effect.

THE MOUNTAIN  
TELEPHONE  
TELEGRAPH

By E. M. HALL,  
One of its  
Attorneys

[Seal]

STANDARD ACCIDENT  
INSURANCE

By L. B. TIPLIN

Attest:

By ALBERT D. DAY,  
Attorney in Fact.

ing bond, to operate as a supersedeas,  
is 5 day of October, 1936.

JAMES H. BALDWIN,  
Judge.

Filed Oct. 5, 1936. [325]

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on Oct. 5th, 1936, Citation on Appeal  
in, which original Citation is hereto  
s in the words and figures following,

t and Cause.]

CITATION.

ates of America to Fred W. Pooler,  
TG:

by cited and admonished to be and  
United States Circuit Court of Ap-  
Ninth Circuit to be held at the City  
sco, California, within thirty days  
ereof, pursuant to an order filed and  
office of the Clerk of the District  
United States, for the District of  
ing an appeal from a judgment filed  
said Court on the 27th day of No-  
in your favor and against said de-  
an action at law, No. 860, wherein  
tiff, and The Mountain States Tele-  
graph Company the defendant, to  
any there be, why the judgment ren-

dered against the said defendant s  
 versed and corrected, and why just  
 done the parties in that behalf.

Dated this 5th day of October, A

JAMES H. BAL

United States

District of

We, the undersigned, as Attorne  
 the plaintiff, this 7th day of Octo  
 due personal service of the foreg  
 behalf of Fred W. Pooler, plaintiff

T. J. DAVIS,

L. C. MYERS,

Attorneys

& App

[Endorsed]: Filed October 7, 19

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Thereafter, on Oct. 13th, 1936, Pr  
 script on Appeal was filed herein, i  
 figures following, to wit: [329]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the Above-Entitle

Please prepare a transcript of th  
 for the purpose of an appeal of  
 United States Circuit Court of A  
 Ninth Circuit, and include therein

Complaint;  
Intention of Filing Petition for

Removal to Federal Court;

Removal;

Removal;

Removal;

Complaint;

Denying Demurrer to Original Com-

Amended Complaint;

Amended Complaint;

Denial of Order Overruling Demurrer to

Complaint;

Amended Complaint;

Answer;

Exceptions of Evidence;

New Trial;

Minute Entry of Order denying Motion

Exceptions No. 2 on order Denying Mo-

Trial;

Petition for Appeal and Order Al-

of Errors;

Appeal;

Appeal;

e. [330]

and forward with said transcript,

to be used on the appeal and to be-

come a part of the record on the cause to the Circuit Court of Appeals, Circuit, every exhibit that was in evidence on the part of the plaintiff of the defendant.

MILTON SMITH,  
T. J. WALKER,  
GUNN, RASCH, F  
Attorneys for A  
and Defendan

Personal service of within pra admitted and receipt of copy ac 13th day of October, 1936.

T. J. DAVIS  
L. C. MYER  
Attorney

[Endorsed]: Filed Oct. 13, 1936

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CLERK'S CERTIFICATE TO  
OF RECORD.

United States of America,  
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable United States Circuit Court of Appeals for the District of Montana, that the foregoing two volumes, consisting of 331 pages, numbered consecutively from 1 to 331 inclusive, constitute a full, true and



record and proceedings, called for by  
Case No. 860, Fred W. Pooler, Plain-  
Mountain States Telephone & Tele-  
graph Company, Defendant, as appears from  
the records and files of said Court in my  
possession as Clerk; and I further certify and  
have annexed to said transcript and  
in said pages the original Citation  
in the cause.

I certify that the costs of said transcript  
amount to the sum of Fifty-five and  
no/100 (\$55.65), and have been paid by the

Deft. in hand and the seal of said Court at  
St. Louis, this October 24th, A. D. 1936.

C. R. GARLOW,

Clerk. [332]

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No. 8367. United States Circuit  
Court of Appeals for the Ninth Circuit. The Moun-  
tain States Telephone and Telegraph Company,  
Plaintiff, vs. Fred W. Pooler, Appellee. Tran-  
script. Upon Appeal from the District  
Court of the United States for the District of

St. Louis, Mo.,  
October 29, 1936.

PAUL P. O'BRIEN,

United States Circuit Court of Appeals  
for the Ninth Circuit.

